SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

JULIUS ROSENBERG AND ETHEL ROSENBERG,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No.

MORTON SOBELL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

JULIUS ROSENBERG and ETHEL ROSENBERG, Appellants

UNITED STATES OF AMERICA,

against

MORTON SOBELL, Appellant

STATEMENT UNDER RULE 15 (b)

These proceedings, under Section 2255, Title 28, U.S.C., were commenced by Order to Show Cause, the one signed and filed November 24, 1952, and the other November 25, 1952.

The parties to the one are Julius Rosenberg and Ethel Rosenberg, petitioners and appellants herein, and to the other, Morton Sobell, a co-petitioner and co-appellant whose record is consolidated with the record of the petitioners-appellants Julius Rosenberg and Ethel Rosenberg, but whose appeal is being prosecuted separately. The other party is the United States of America.

The above are the original parties and no change has taken place.

[fol. 2] The Orders to Show Cause and the petition of the appellants Rosenberg upon which the application is based was filed November 24, 1952, opposing affidavits were filed by the United States of America on December 1, 1952 and reply and supplemental affidavits were filed by the appellants on December 2 and 5, 1952.

The petition of the co-appellant Morton Sobell was presented to the Court on November 24, 1952 and filed on November 25, 1952, after the filing of an initial Order to Show Cause seeking auxiliary relief on November 19, 1952, the opposing affidavits of the United States of America as to this co-appellant were, with one exception, the same as

with respect to the appellants Rosenberg. The petitioner-appellant Morton Sobell filed supplemental affidavits on December 5, 1952.

The appellants Julius Rosenberg and Ethel Rosenberg are in the Sing Sing Prison, Ossining, New York, under and by virtue of judgments of conviction made and entered April 5, 1951 and an order of Hon. Irving R. Kaufman on November 21, 1952 refixing the date of their execution for the week commencing January 12, 1953. The co-appellant Morton Sobell is now confined in Alcatraz Prison, Alcatraz, California under a separate judgment of conviction dated and entered April 5, 1951.

On December 2, 1952, oral argument was had by the appellants Rosenberg and the co-appellant Sobell before Hon. Sylvester J. Ryan, a United States District Judge for the Southern District of New York on their application under [fol. 3] Section 2255, Title 28, U. S. C.

On December 10, 1952 an order was made and entered by Judge Ryan denying the application of the appellants Rosenberg and by separate order made and entered the same day denying a stay of their execution pending the determination of the appeal herein. An opinion was duly filed by the said Judge on the same day. Similar disposition denying the application of the co-appellant Sobell was made by Judge Ryan on the same day, except that the co-appellant Sobell did not request a stay pending the determination of the appeal herein but an order retransferring the said appellant from Alcatraz Prison to a place of incarceration within the confines of the jurisdiction of this Court, which was denied by order made and entered December 10, 1952.

[fol. 4] In United States District Court for the Southern District of New York

No. C 134-245

United States of America,

against

Julius Rosenberg and Ethel Rosenberg, Appellants

Notice of Appeal of Rosenbergs—December 10, 1952

Name and address of appellants: Julius Rosenberg, 354 Hunter Street, (Sing Sing Prison) Ossining, New York; Ethel Rosenberg, 354 Hunter Street, (Sing Sing Prison) Ossining, New York.

Name and address of appellants' attorney: Emanuel H. Bloch, 401 Broadway, New York City 13, New York.

The appeal is from an

(a) Order of Hon. Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York, dated and filed December 10, 1952, denying the application of the appellants, under Section 2255, Title 28, U.S.C., to set aside and vacate sentences of death imposed upon each of them under separate judgments of conviction for the crime of conspiracy to commit espionage (Section 34, Title 50, U.S.C.) dated and filed April 5, 1951, and order of Hon. Irving R. Kaufman, Judge of the United States District Court for the Southern District of New York, dated and filed November 21, 1952 refixing the date of the execution of the death sentences for the week commencing January 12, 1953, and denying the appellants' application for a stay of the execution of the aforesaid judgments of conviction and the sentences imposed thereunder; and

[fol. 5] (b) an order of the said Hon. Sylvester J. Ryan, dated and filed December 10, 1952, denying to the appellants a stay of the execution of the said judgments of conviction pending the determination of the appeal herein.

Name of institution where now confined: Sing Sing Prison (Death House), Ossining, New York: The appellants are imprisoned and are not under bail.

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated orders and each and every part thereof.

Dated: December 10, 1952.

Emanuel H. Bloch, Attorney for Appellants, 401 Broadway, New York City 13, N. Y.

[fol. 6] IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

MORTON SOBELL, Petitioner

NOTICE OF APPEAL OF SOBELL—December 10, 1952

Name and address of appellant: Morton Sobell, care of Warden, Alcatraz Island Penitentiary, San Francisco, California.

Name and address of appellant's attorneys: Howard N. Meyer, Harold M. Phillips and Edward Kuntz, 205 West 34th Street, New York 1, New York.

Offense: Conspiracy to commit espionage, former Title 50, Section 34, U. S. Code.

Concise Statement of Order Appealed from: Order dated December 10, 1952, dismissing petition under 28 U. S. C. Sec. 2255 dated November 24, 1952, in which petitioner sought an order vacating and setting aside the judgment of conviction and discharging petitioner from custody.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order referred to above.

Dated: New York, New York, December 10, 1952.

(s) Howard N. Meyer, Harold M. Phillips, Edward Kuntz, Attorneys for Appellant, 205 West 34th Street, New York 1, New York.

[fol. 7] IN UNITED STATES DISTCICT COURT

[Title omitted]

ORDER DENYING ROSENBERGS' MOTION TO VACATE—December 10, 1952

The defendants having moved this Court pursuant to Section 2255, Title 28, United States Code for an order vacating and setting aside the respective sentences of the defendants and discharging them from detention and imprisonment, and having moved for an order staying the United States of America from executing the defendants pursuant to the judgment dated April 5, 1951 and the order of this Court dated November 21, 1952, and the defendants having been heard by their attorney Emanuel H. Bloch, and having filed a petition on behalf of Julius and Ethel Rosenberg by Emanuel H. Bloch, their attorney, dated November 24, 1952, and the affidavits of James Gerald Crowther, Thomas Reeve Kaiser, Jacques S. Hadamard, John Desmond Bernal, together with accompanying exhibits, and having submitted a reply affidavit of Emanuel H. Bloch, and having submitted supplemental affidavits of Emanuel H. Bloch, Milton Lewis, Edward Ranzal, George Trow and Gertrude M. Evans, all duly verified in support of said motion, and the United States of America having appeared by James B. Kilsheimer III, Assistant United States Attorney, and having filed affidavits of Myles J. Lane, John M. Foley, David Sweeney, John W. Lewis, Leo H. Frutkin, Walter C. Roetting and John A. Harrington, all duly verified in opposition thereto, and due deliberation having been [fol. 8] had, and the Court having determined that the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioners are entitled to no relief, and that no substantial question of law has been raised by these proceedings, and the Court having filed its opinion on December 10, 1952,

Upon motion of Myles J. Lane, United States Attorney for the Southern District of New York, it is

Ordered that the aforesaid motion be and the same is hereby denied, and it is further

Ordered that the application of the petitioners for a

stay of execution of the judgment pronounced against them be and the same is hereby denied.

Dated: New York, N. Y., December 10, 1952.

Sylvester J. Ryan, U.S. D.J.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING SOBELL'S MOTION TO VACATE—December 10, 1952

The defendant having moved this Court pursuant to Section 2255, Title 28, United States Code for an order setting aside the judgment of conviction of the defendant, and the defendant having been heard by his attorney Howard N. Meyer, and having filed a petition of the defendant dated November 24, 1952, and affidavit of Howard N. Meyer, dated November 24, 1952, a reply affidavit of Edward Kuntz, and a supplemental affidavit of Howard N. Meyer, all duly verified in support of said motion, United States of America having appeared by James B. Kilsheimer III, Assistant United States Attorney, and having filed an affidavit of Myles J. Lane in which is incorporated affidavits submitted in opposition to the companion petition on behalf of the defendants Julius and Ethel Rosenberg, all duly verified in opposition thereto, and due deliberation having been had, and the Court having determined that the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioner is entitled to no relief, and the Court having filed its opinion on December 10, 1952, it is

Upon motion of Myles J. Lane, United States Attorney for the Southern District of New York,

Ordered that the aforesaid motion be and the same is hereby denied.

Dated: New York, N.Y., December 10, 1952.

(s) Sylvester Ryan.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING ROSENBERGS' APPLICATION FOR STAY—December 10, 1952

The defendants having moved for an order in open court on December 10, 1952 staying the execution of the separate judgments of conviction against them for the crime of conspiracy to commit espionage (Section 34, Title 50, U. S. C.), dated and filed April 5, 1951 and the order of Hon. Irving R. Kaufman, Judge of the United States District Court for the Southern District of New York, dated and filed November 21, 1952, refixing the date of the execution of the death sentences imposed under the aforesaid judgments of conviction for the week commencing January 12, 1953, pending an appeal to the United States Court of Appeals for the Second Circuit from an order of Hon. Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York, dated and filed December 10, 1952 denying the application of the defendants, under Section 2255, Title 28, U. S. C., to set aside and vacate the sentences of death imposed upon each of them under the aforesaid separate judgments of conviction, and staying the execution of the said judgments of conviction and

After hearing in open court on December 10, 1952, Emanuel H. Bloch, attorney for the defendants in support of the said application and the United States Attorney for the Southern District of New York, by James R. Kilsheimer, Jr. [fol. 11] Assistant United States Attorney, in opposition thereto, and due deliberation having been had thereon, and the Court having found that such appeal presents no substantial question of law, it is

Ordered that the application of the defendants, Julius Rosenberg and Ethel Rosenberg, to stay the execution of the separate judgments of conviction against them for the crime of conspiracy to commit espionage (Section 34, Title 50, U.S.C.) dated and filed April 5, 1951 and the order of Hon. Irving R. Kaufman, Judge of the United States District Court for the Southern District of New York, dated and filed November 21, 1952, refixing the date of the execu-

tion of the death sentences imposed under the said separate judgments of conviction for the week commencing January 12, 1953 until the determination of the appeal of the said defendants from the said order of Hon. Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York, dated and filed December 10, 1952, denying the application of the defendants, under Section 2255, Title 28, U.S.C., to set aside and vacate the sentences of death imposed upon each of them under the aforesaid separate judgments of conviction and denying a stay of the execution of the said judgments of conviction, be and the same is in all respects denied.

Dated: New York, N.Y., December 10, 1952.

Sylvester J. Ryan, U.S. D.J.

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C. 134-245

UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG, and MORTON SOBELL

APPEARANCES:

Myles J. Lane, Esq., United States Attorney for the Government; Myles J. Lane, Esq., United States Attorney, and James B. Kilsheimer III, Esq., and Robert Martin, Esq., Assistant United States Attorneys.

Emanuel H. Bloch, Esq., Attorney for Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Esq., Attorney for Morton Sobell.

RYAN, J.

OPINION—December 10, 1952

Petitions under Section 2255, Title 18 USCA, have been filed by Julius Rosenberg, Ethel Rosenberg and Morton Sobell praying for an order vacating and setting aside

judgments of conviction and sentences imposed upon them on April 5, 1951 after a jury trial at which one of my brothers in this District Court presided as the trial judge. He, for reasons which he has placed upon the record, has disqualified himself from hearing these petitions and they have come on to be heard before me on assignment from the Chief District Judge. Petitioners seek in the alterna-
[fol. 13] tive a hearing on the petitions "to determine the issues and make findings of fact and conclusions of law, and upon such findings and conclusions, vacating and setting aside the respective sentences of the petitioners and discharging them from detention and imprisonment."

I find no relevant or material issue of fact raised by the petitions, which requires a hearing thereon or which renders the taking of oral testimony either necessary or helpful. I have concluded, after affording the attorneys for petitioners full opportunity to argue the legal problems presented by the petitions and to make proffers of proof, that the petitioners are entitled to no relief, that the court which rendered judgment had jurisdiction, that the sentences imposed were authorized by law and are not otherwise open to collateral attack on any of the grounds urged by the petitioners (1), and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed.

These petitioners were filed twenty months after the verdict of guilty was returned by the jury, following a trial which petitioners' attorneys stated "had been conducted * * * with that dignity and that decorum that befits an American trial" (R. 1453), (2) and that defense counsel had been afforded "every privilege that a lawyer should expect in a criminal case."

[fol. 14] The trial record reveals a defense intelligently conducted by able counsel of petitioners' own choice and selection. The verdict of the jury has now been challenged, although when it was returned the attorney for petitioners Rosenberg stated that from the length of time the jury had taken in their deliberations, as well as from the questions they had asked during the course of their deliberations, he was satisfied that the jury had examined the evidence very carefully. (R. 1583.)

Since the petitioners were sentenced, they have had the

benefit of an appeal to the Court of Appeals, a petition for rehearing of that appeal, a petition to the Supreme Court for a writ of certiorari and a further petition to the Supreme Court seeking a rehearing. I have annexed, as an Appendix, a schedule showing in detail the points and objections the petitioners have heretofore urged on the various appeals and petitions they have filed. These appeals and proceedings operate to buttress the presumption of regularity and of due process attending judgments of conviction, especially in the complete absence of creditable evidence to the contrary. (3.)

I have considered each ground urged by petitioners as the basis for the granting of the relief they now seek.

Petitioners complain of the pre-trial and trial publicity and argue in substance that it so adversely reflected on [fol. 15] their innocence and created a trial atmosphere of such prejudice and hostility toward them as to make impossible the selection of an impartial jury and the conduct of a fair trial. They object to the "newspaper publicity developed by the independent initiative and private enterprise of the newspapers" and say it contributed to a situation by which they were denied the essential requirement of fair play and of justice—a trial by an impartial jury.

We enjoy a free press; neither the policies nor writings of the press may be censored or dictated by the state or government agencies. "Jurors cannot be treated as unable to withstand any effect of newspaper publications. Indeed such a ruling would make it practically impossible to conduct trials in metropolitan centers and would treat the average sceptical juror as a helpless person." (4.)

Newspapers, unquestionably in response to popular demand, feature with large headlines and considerable space reports of investigations of corruption, crime, vice and espionage activities. The trials of those charged with these offenses have been made "sensational" and have been the source of what is well-nigh universally considered by the newspapers as "good copy." I need not here consider the wisdom of attempts at judicial curtailment of such publications, or the dangers to our constitutional guaranties of freedom of speech and press which would flow in the wake [fol. 16] of unwarranted judicial restrictions on free expression.

A reading of the newspaper articles submitted by petitioners reveals nothing of an unusual or inflammatory character. The articles seem but a fair response to a legitimate public interest in a matter of vital concern to all—the atom bomb and atomic energy and the hope for its employment for the benefit and not the destruction of mankind. The accounts of the arrests and subsequent indictments of petitioners tended to allay a public anxiety and to give assurance that those charged with the protection of vital information were alert and diligent in the performance of their obligations.

When these publications are measured against the field in which they were circulated their effect upon the general public is seen as negligible. (5.) There was no unseemly rush to bring the petitioners to trial. Julius Rosenberg was arrested on July 17, 1950; Ethel Rosenberg on August 11, 1950 and Morton Sobell on August 18, 1950. The trial began on March 6, 1951, shortly less than seven months after the arrest of Sobell, the last defendant to be taken into custody. Any public prejudice which might be ascribed to newspaper publicity incident to the arrest of these defendants had long since been dissipated among the populace of the area from which talesmen were drawn—an area where occurrences no matter how sensational lose their news value and no longer attract public interest after a [fol. 17] much shorter space of time than seven months.

When the indictment was called for trial no application was made for a continuance and the petitioners announced that they were ready. No objection was then urged that newspaper publicity had produced so hostile an atmosphere or so prevalent a public preconception of guilt as to make the selection of a fair and impartial jury either difficult or impossible. Although I recognize that a defendant "is not obligated to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed" (6), I feel that the failure of the petitioners to apply for a change of venue has added significance when considered with their omission to make application for an adjournment of the trial. This neglect of the petitioners to avail themselves of long-established remedies supports the conclusion that the publicity of which they now complain was neither so damaging nor widespread

in effect as they now urge. The petitioners and their attorneys were no strangers to the great metropolitan district in which the trial took place. It would be ridiculous to hold that if the publicity before trial had been so prejudicial as to inflame and infect the public mind they could have been entirely ignorant of it. (7.)

The voir dire examination of the prospective jurors was fully and fairly conducted by the trial judge. (8.) The petitioners were granted ten additional peremptory challenges; they did not exercise all of these and informed the [fol. 18] court that the jury was satisfactory. (9.) This was the considered judgment and decision of the "highly competent and experienced" (10) attorneys who represented the petitioners on the trial.

Quite aside from the question of whether this objection may now for the first time be advanced as a ground for a new trial (11) I find no evidence to support the claim that the trial proceeded under conditions which deprived the petitioners of the opportunity for a fair trial before an impartial jury.

In fact, an examination of the chart which petitioners have submitted purporting to analyze "Quantitative Reportage, Feb. 1, 1950 to April 3, 1951" dealing with news items classified in four groupings—"Atomic Espionage," "Communists as Spies," "Atomic Bomb" and "Rosenberg-Sobell Case"—sustains this conclusion. I find that from the latter part of August 1950 to November 1950 there was only minor and sporadic coverage and that from November 1950 until February 21, 1950, which was approximately two weeks prior to the commencement of the trial, there were no news items whatsoever concerning the pending prosecution. During the following week from February 21 to 28, 1951, the publicity was negligible, and when the trial proceeded, the attendant publicity reveals nothing extraordinary or unusual.

[fol. 19] Petitioners next object to publicity which resulted from "press-releases" and "statements" emanating from the office of the United States Attorney and the Department of Justice.

It appears from the exhibits submitted by petitioners that as the trial proceeded there were daily reports in the newspapers of the progress of the trial, the witnesses called

and the testimony given. On a few occasions during the trial "statements" were made to the press by those charged in law with conducting the prosecution. It appears further that following the arrest of the petitioners and prior to trial "press-releases" were issued by the prosecuting and law enforcement agencies of the Government.

The issuance of "releases" and "statements" by the quasi-judicial officials entrusted with the heavy burden and grave responsibility of prosecution giving in advance of trial details of evidence which it is expected will be introduced at trial is an all too prevalent practice, which should not be encouraged. It does not aid in the administration of justice and often hampers and impedes complete investigation of the crime, which might be productive of further evidence if not of other crimes. It is opposed to all fundamental concepts of due process and, if carried to an extreme, might result in conviction by public opinion without the benefit of jury. Due process requires compliance not only with the outward form of the law but with "all [fol. 20] that is 'implicit in the concept of ordered liberty' " (12) and with the immutable principles of justice. But, even though the "press-releases" and "statements" of public officials may have prompted, encouraged or generated publicity, there is no evidence that these publications resulted in "manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury." (13.)

There is no evidence that any juror after being sworn violated the trial judge's instruction and read any newspaper report or article concerning the trial of petitioners. There is no proof to sustain a finding that the judgment of the jurors was in any manner influenced or swayed adversely to the petitioners, either prior to or during the trial. This is not an instance where "the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated." (14.)

The petitioners also claim that the publicity attending the indictment for perjury and the arrest of William Perl, which occurred while the trial was in progress, had the effect of prejudicing the minds of the jurors against the petitioners.

The facts concerning the Perl indictment and arrest are

not in dispute. He had been a witness before a Grand Jury in this district; he was indicted by that Grand Jury on [fol. 21] March 13, 1951 and when the indictment had been returned it was ordered sealed. Late the following day the indictment was unsealed upon application to the judge presiding at petitioners' trial; the application was made to him because the judge then assigned to that duty was not available. Perl was then arrested and arraigned on March 15, 1951, not before the trial judge, but in the part where such arraignments are held. There was nothing unusual in the procedure followed. The indictment against Perl charged perjury before the Grand Jury; it contained four counts: the first count was with respect to his testimony concerning the petitioner Sobell; the second count contained charges with respect to his testimony concerning Helene Elitcher, the wife of Max Elitcher who had appeared as a Government witness on the trial of the petitioners before the return of the Perl indictment; the third count concerned his testimony as to his knowledge of the petitioner Julius Rosenberg; and the fourth count concerned his testimony as to his knowledge of Ann and Michael Sidorovich, who had been listed as prospective Government witnesses on the trial of petitioners. The allegedly false testimony upon which counts one, two and three of the indictment were based, it is charged, was given before the Grand Jury on August 18, 1950; the fourth count was predicated upon testimony given by Perl on September 11, 1950.

[fol. 22] The petitioners argue that the filing of the indictment and the arrest of Perl were deliberately scheduled so as to provide an occasion during the trial for publicity unfavorable to the petitioners. They ask that this inference be drawn from the foregoing facts and from the circumstance that Perl has not yet been brought to trial on this indictment.

By affidavit, the United States Attorney now reveals that it was not until March 6, 1951 that he came into possession of evidence sufficient in law to sustain Perl's indictment for perjury. This satisfactorily explains why Perl was not indicted until March 13, 1951 for perjury alleged to have been committed on August 18, 1950 and on September 11, 1950. The United States Attorney further states that the

Perl indictment has not yet been brought to trial because of a purpose on his part to prevent disclosures which would interfere with other prosecutions. I may not on this hearing pry into the reasons which prompted the prosecutor to adjourn the trial of the Perl indictment. I accept the explanation given; certainly the delay does not warrant drawing the inference which petitioners press.

Again as to this indictment of Perl, there is not the slightest proof that any of the trial jurors read of the arrest or indictment of Perl or that it came to their attention in any manner.

[fol. 23] A defendant may not demand that the machinery of law enforcement be stopped while his trial proceeds, or that the prosecution of others, who, as he, are charged with violating the law, be held in abeyance until his trial has been completed. If an incident occurs during his trial arising either from the prosecution of another or from any other cause which acts to his prejudice, the law provides that steps be taken by the defendant. The matter should first be called to the attention of the trial judge with a request for appropriate action. The judge is not "confined within mechanical rules" but has authority to exercise wide discretion to correct any situation harmful to a defendant. (15). The trial judge upon proper application by the petitioners might have "caution(ed) the jury not to be influenced by anything seen in the newspapers or to declare a mistrial." (16). The petitioners did bring the matter of Perl's indictment before the trial judge but they elected not to move for a mistrial; they may not now object.

The petitioners also urge that the United States Attorney "knowingly used false testimony" on the trial. Three specifications are made in support of this claim: (1) that the witness David Greenglass, called by the Government, testified falsely concerning his cooperation with the law enforcement agencies; (2) that the same Greenglass testified falsely concerning the preparations he had made to equip [fol. 24] himself to testify relating the subject matter and the information unlawfully transferred by him; and (3) that the Government witness Ben Schneider falsely testified that up to his appearance as a witness he had not seen the petitioner Julius Rosenberg since his visit to Schneider's

photography store to have passport photographs taken. I shall consider each specification of this claim—

1. Greenglass testified that he had been arrested on June 15, 1950 (R. 567) by four agents of the Federal Bureau of Investigation, who had come to his home at about 2 P.M. on that day; that the agents had remained with him in his home until 7 or 7:30 p.m.; that once in a while one of them questioned him; that he was then taken down to the office of the Federal Bureau of Investigation where he later stated that he would make a statement; that a stenographer was brought in and that his statement was stenographically recorded (R. 575). When he was pressed on the trial as to the exact time when he had said he would make the statement, Greenglass testified: "You can't pinpoint me on when I said I was going to give a statement, because I don't remember those things." (R. 575). Questioned further on the subject he added that he hadn't "read that statement since and I certainly don't know exactly what I put in it" (R. 577), but he added that he hadn't "conscientiously" withheld any facts that night and that the statement he had then made was substantially the same as his testimony on the trial. (R. 577).

[fol. 25] At no time did petitioners' attorneys call for the production of the statement, or ask the trial judge to examine it for the purpose of determining whether it did in fact contain statements contradictory to the testimony he had given on the trial. No request was made for a direction that the statement be delivered to petitioners' attorneys for use on their extensive and searching cross-examination of Greenglass (R. 537 to 676).

It is now argued that Greenglass falsely testified concerning his disclosure on the night of his arrest and that he did not in fact make full disclosure as to his activities until a later date. This argument the petitioners predicate upon a statement by the United States Attorney made when Greenglass appeared for sentence on April 6, 1951 (R. 1623). When this is read in context with all the proceedings had that morning, and particularly the statement of Greenglass' attorney that Greenglass "did cooperate with the Government and almost from the outset" (R. 1628), we do not take it as an admission unwittingly made that

Greenglass had committed perjury. I do not have to consider the affidavits of Special Agents Lewis and Frutkin to arrive at a finding that there is no factual basis for inferring that Greenglass' testimony was perjurious or "that it was knowingly, wilfully and intentionally used." (R. 17).

Full opportunity during trial was available to petitioners' attorneys to demand at least a preliminary examina-
[fol. 26] tion of Greenglass' statement; no such application was made. I do not feel called upon to now examine the statement on the flimsy showing made.

2. The second objection centers around Government's Exhibits 2, 6, 7 and 8, which were introduced in evidence during and on the basis of the Greenglass testimony.

Exhibit 2—according to Greenglass—was a copy of a sketch of the lens mold which Greenglass testified he had delivered to Julius Rosenberg in January 1945 (R. 439-40). He had prepared this copy of the sketch during the trial (R. 440).

Exhibit 6—according to Greenglass—was his recollection of the sketch of the face view of the flat type lens mold which he had given to Gold in June, 1945 (R. 460, 461).

Exhibit 7—Greenglass testified—was his recollection of a sketch of a schematic view of the lens mold shown on Exhibit 6 being used on experiment (R. 462), which he also gave to Gold in June, 1945.

Exhibit 8—Greenglass testified—represented his recollection of a sketch of a cross-section of the atom bomb, which he gave to Rosenberg in September, 1945. (R. 498).

Greenglass testified that "high explosive lens molds" were made in his shop (R. 495); that the one from which he had acquired his knowledge was of a different type from that used at Hiroshima, and was a type that worked on an "implosion effect" and which had been manufactured at
[fol. 27] Los Alamos (R. 495). Greenglass also testified that when he had given Gold the sketches of which Exhibits 6 and 7 were replicas, he also "gave some scientists' names" and "some possible recruits for espionage" (R. 497). He testified that it all took up about 12 pages of written material including the sketch of the cross-section of the atom bomb.

On cross-examination, Greenglass testified that when

drawing Exhibits 2, 6 and 7 he had relied solely on his memory of information he had acquired while working at the Los Alamos project, and that he had last worked there in February, 1946,—four and one-half years before he testified (R. 461, 463, 609); and, that since his arrest and during his confinement in jail he had not been given any reference work, texts or scientific books. (R. 610). He further testified that he had not received help from anybody in the preparation or drawing of these exhibits.

Exhibit 8 was impounded by the trial judge after being introduced in evidence.

Petitioners now submit affidavits from three individuals, represented as experts in the field of physics, who express the opinion that it is "improbable" that Greenglass could have reproduced the sketches from memory. A fourth affidavit from a scientific writer or correspondent for a newspaper records his opinion as to the "impossibility" of [fol. 28] Greenglass' being able to make these sketches from memory. It is upon these "opinions" that petitioners would have me find that Greenglass gave perjurious testimony concerning the circumstances surrounding the drawing by him of these exhibits. None of these four affiants could possibly have seen Exhibit 8, which had been impounded.

There may be some rare instances when a trial judge permits testimony by medical experts as to the competence or probity of a witness when appraised solely on his mental ability to testify truthfully,—that is, whether the witness is a pathological liar or mentally incapable of telling the truth. But it is hornbook law that the credibility of a witness and the weight to be given his testimony rests exclusively with the jury. Opinion evidence when offered by one who has neither observed the witness while he testifies nor ever seen him is inadmissible on any trial and may not be considered by me as the basis for a conclusion that perjury was committed.

3. The next objection as to the knowing use of perjurious testimony concerns the witness Ben Schneider, who was called in rebuttal by the Government.

Schneider testified that he was a photographer and that he had a store at 99 Park Row, where his main business was

[fol. 29] taking photographs for passport and identification purposes; that in May or June, 1950 the petitioners Rosenberg and two children visited his shop and ordered and paid for three dozen photographs, passport-size, for which he was paid $9.; that Julius Rosenberg at the time told him that he was going to France; that some property had been left his wife and that they were going to take care of it. (R. 1428-29). Schneider further testified that he had first been told he would be a witness at about 11:30 A.M. on the day before he testified when he had been visited by some agents of the Federal Bureau of Investigation (R. 1425).

Just prior to the close of his direct examination, Schneider was asked, with reference to the last time he had seen Julius Rosenberg, the following question to which he made the following response:

> "Q. And is that the last time you saw him before today?
>
> A. That's right."

It is not disputed that on the day prior to Schneider's testimony he had been brought into the trial courtroom for the purpose of seeing whether he could identify Rosenberg as the person whose photograph he had taken. There was no motive for falsehood on the part of Schneider and there is not the slightest evidence that Schneider's testimony on this was intentionally false. I hold it to be on an immaterial point because the petitioners Rosenberg did not deny on [fol. 30] cross-examination prior to Schneider's appearance as a witness that they had asked in Schneider's store. Thus, Julius Rosenberg was questioned:

> "Q. Did you go to a photographer's shop at 99 Park Row and have any photos taken?
>
> A. I have been in many photographers' shops and had photos taken.
>
> Q. Did you have any taken in May or June of 1950?
>
> A. I don't recall. I might have had some photos taken.
>
> • • • • • • •
>
> Q. Now, do you recall, or are you sure now that you didn't have any passport pictures taken in 99 Park Row, in May or June 1950?

A. I may have taken pictures, not—I didn't take any passport pictures.

Q. May or June 1950?

A. I might have taken pictures.

Q. For what purpose have you taken pictures in May or June 1950?

A. I have already answered that.

Q. May we have an answer?

A. Just taken pictures" (R. 1278-79).

The testimony of petitioner Ethel Rosenberg at no point shows a categorical denial that she and her family had gone to the photographer's shop at 99 Park Row in May or June 1950.

The vital portion of Schneider's testimony was his recollection of what Julius Rosenberg had told him; on that a sharp issue was raised and it appears from the verdict to have been resolved by the jury adversely to the petitioners. The challenge now made to Schneider's testimony does not stamp him as a perjurer.

Petitioners also urge that their conviction should be set [fol. 31] aside because the evidence failed to show that all the information which they conspired to transmit was of such a character as could properly be classified secret.

To establish need for the secrecy of some of the information unlawfully transmitted, the Government called a physical chemist who had been employed as an engineer at the Los Alamos Scientific Laboratories from 1944 through part of 1947. He testified that the work "was associated with implosion research connected with the atomic bomb." (R. 470). He identified Exhibit 2 as a reasonably accurate portrayal of a type of lens used at Los Alamos. (R. 473). He gave similar testimony as to Exhibit 6 (R. 474). He identified Exhibit 7 as a rough sketch of an experimental set-up (R. 477), and testified that Greenglass in his employment had access to the information shown on these exhibits. (R. 479). He testified that information relating to the lens mold, the lens and the experimentation had been classified as secret. (R. 478-9). He gave his expert opinion that of the experimentation "there was no information in text books or technical journals on this subject" (R. 478), and that it

concerned "a new and original field." (R. 478). Just before this witness left the stand the court inquired of him—

> [fol. 32] "Q. While there might have been some other details that might also have been of some use to a foreign nation which were not contained on Exhibits 2, 6 and 7, the substance of your testimony is that there was sufficient on Exhibits 2, 6 and 7 to reveal to an expert which was going on at Los Alamos?
> A. Yes, your Honor." (R. 485-6).

The Government also called another engineer who was familiar with the work at Los Alamos. He testified that the sketch—Government's Exhibit 8—when considered with the material Greenglass testified he had disclosed, demonstrated "substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (R. 910) and that it was classified as top secret (R. 911).

Although petitioners were found guilty of conspiring to transmit many items of classified information, their present attack on such classification as "arbitrary and capricious" is directed to but one item—information relative to the use of the lens in the atomic bomb.

They contend that there was nothing informative or new about the details of the high-explosive lens used in atomic weapons, that the theory underlying the use of the lens and implosion has been known for many years. They have listed the names and authors of various treatises and texts in the field of nuclear physics, and from this would have me conclude that the experimentation in the use of the atomic bomb which was disclosed was a matter of public knowledge.

[fol. 33] Assuming that what they say is so—that the theory of atomic energy in the explosives field was known or contemplated years ago by scientists and physicists—it does not follow that the practicability and feasability of applying this theory to the manufacture of modern war implements was common knowledge to any other country. Certainly, we cannot say that in the United States this information has been made public, nor can we assume that "it has become available in one way or another to any foreign government." (18). Petitioners offer no evidence

to support their contention that the classification of this information was arbitrary, or that the United States Government had information which would have led it to believe it was well-known.

The claim now made by petitioners cannot be said to constitute newly-discovered evidence. The very basis of their argument that prior knowledge of this use of atomic energy is revealed by the recorded experiments and treatises of numerous physicists was evidence available to them during the trial and an issue which could have been presented then and considered by the jury in its determination of the nature of the information which petitioners conspired to transmit. (19).

This issue of fact was presented to the jury by the trial judge (R. 1554); it was resolved against the petitioners; it may not be retried on this application.

[fol. 34] An additional ground for relief is urged by petitioner Sobell under the Treason Clause of the Constitution (Art. 3, sec. 3, Cl. 1), which provides in part that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court."

It is argued that this clause was violated by the admission of evidence of a "general intent to betray", unsupported by the testimony of two witnesses; that such testimony was erroneously admitted to prove the specific criminal intent to give secret information required by the Espionage Act; and that absent a prior showing of specific criminal intent, evidence of a general treasonous intent can under the Treason Clause only be established by the testimony of two witnesses.

At trial there was testimony offered and received over objection by petitioner's attorney (R. 198, 305) that Sobell had been a m-ber of the Communist Party in 1939-1941. At one point in a long discussion concerning the admissibility of this evidence, the trial judge inquired of the United States Attorney the theory on which it was offered, and the following colloquy ensued:

> "The Court—On what theory are you offering it? To prove the offense in the indictment?

Mr. Saypol—Oh, indeed not; to prove association, to prove intent, to prove motive for the crime which will be proved.

The Court—Very well. I will overrule the objection." (R. 199).

[fol. 35] Later the trial judge said that he was admitting the evidence "purely on the question of motive and not as proving the charge" (R. 200); still later the trial judge observed "you have to have intent; you have to have criminal intent," at which point Sobell's attorney remarked "this statute, every word of it, the statute reads with intent, or reason to believe." (R. 201).

The objection interposed to the reception of this testimony was couched in terms that it was "incompetent, irrelevant and immaterial to the issues in this case and can only inject an extraneous issue that will confuse the jury and prejudice the defendants." (R. 199). At no time was objection made that the reception of this testimony in the prosecution of an indictment returned for violation of Section 34, Title 50 U. S. C., would in effect resolve the charges in the indictment to allege Treason instead of Espionage, or result in denial to the petitioners of the constitutional guarantee that "the testimony of two witnesses to the same overt act" be required to sustain a conviction of Treason against the United States. No mention was made by the petitioners of Cramer v. United States (1944), 325 U. S. 1, as being the basis upon which the objections were made.

The trial judge specifically instructed the jury that this testimony was to be considered "solely on the question of [fol. 36] the defendants' intent or reason to believe that the alleged secret information to be transmitted would be used to the advantage of a foreign nation". (20).

The Espionage Act of 1917 'makes criminal * * * the communication of the prohibited information to the advantage of (any foreign nation', even if such communication does not injure this country." (21). The specific intent required by the Statute to be proved as an element of the crime requires not a purpose to "betray" the United States, but to aid a foreign power regardless of injury to the United States. (22). The Court of Appeals so held and doing so approved the instructions of the trial judge.

All of the petitioners on their appeal to the Court of Appeals questioned the admissibility of this testimony, but they did so on the same general objections made during the trial. None, then, presented the constitutional objections now urged, nor was it raised in their applications to the Court of Appeals for re-hearing. The Court of Appeals held that this testimony was properly admitted. (23). The petitioners Rosenberg in their petitions to the Supreme Court for certiorari urged the admission of this testimony to be error and cited "Cramer", *supra*. The petitioner Sobell also relied upon a claim of error in the admission of this testimony and on his petition to the Supreme Court for re-hearing specifically presented the constitutional ob-
[fol. 37] jection now raised.

Ample opportunity was afforded the petitioners to raise the objection now urged as to the admissibility of this testimony at trial and again in the Court of Appeals. But, it is not necessary to hold that it may not now be made because of the limited power we have under Section 2255 (24), for I conclude that this objection is without merit.

The petitions are denied; the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioners are entitled to no relief. (25). Since I find no substantial question of law raised by these proceedings, the application made on behalf of the petitioners Rosenberg for a stay of execution of the judgment pronounced against them is denied.

——— ———, U. S. D. J.

December 10, 1952.

[fol. 38] NOTES TO OPINION

1. Summary of Points Relied on by petitioners, Julius Rosenberg and Ethel Rosenberg as prepared and submitted by their attorneys.

1. Pre-trial and trial publicity, bearing on the issues of the petitioners' case, adversely reflected upon their innocence, pre-conditioned the public mind in the Southern District of New York to an acceptance of their guilt and cre-

ated a trial atmosphere of prejudice and hostility toward them, through:

(a) Newspaper publicity developed by the independent initiative and private enterprise of the newspapers and other mass media of communication circulated within the Southern District of New York;

(b) Information, indicating the guilt of the petitioners "fed to" the press and other mass media of communication circulated within the City of New York by the Federal Bureau of Investigation, the Department of Justice, the office of the United States Attorney for the Southern District of New York, and other officials of Government, and reported widely by the said media of publicity:

(c) The indictment of one, William Perl, procured by the prosecuting authorities in the Southern District of New York in the course of the trial and before the verdict of the petitioners, having the effect of prejudicing the minds of the jurors sitting in the petitioners' cause against the petitioners.

2. The prosecuting authorities knowingly used false testimony to bring about petitioners' conviction.

(a) Alleged cooperation of David Greenglass, main Government witness, with authorities;

(b) Alleged coaching of Greenglass on main elements of case, namely, the subject of alleged transfer.

(c) Schneider testimony.

3. The sentencing court was without jurisdiction to impose the sentence: in that the material allegedly transferred and communicated, the gravamen of the offense, was arbitrarily and capriciously classified as "secret", when in fact it was lawfully, widely and publicly known, and its transmittal or communication, therefore, not violative of [fol. 39] Section 32 (a) and 34 of Title 50 U. S. C. A.

Summary of Points Relied on by petitioner, Morton Sobell, as prepared and submitted by his attorneys.

(a) abuse of process of Court by Perl indictment plus press statements made in connection with it.

(b) Creation of hostile pretrial atmosphere to Sobell by knowingly false allusions to him as "atom spy" and "member of Klaus Fuchs' spy ring".

(c) Feeding prejudicial material to press, to deprive all defendants of presumption of innocence.

(a. to c. also to be considered together as one point).

(d) Violation of treason clause by use of "treachery and general intent to betray".

(e) Knowing use of false testimony (from Rosenberg Petition).

(f) Arbitrary classification of information as secret (from Rosenberg petition).

2. "R" denotes record on petitions to the Supreme Court for certiorari.

3. *Canizio* v. *New York* (1946) 327 U. S. 82-84.

4. *United States* v. *Keegan* (CA2-1944), 141 F. 2d 248, 258.

5. "The effect of inflammatory reporting in large metropolitan communities, where it is most likely to occur, is especially open to question. The daily sensations that are repeated to a sophisticated population are seldom remembered, nor are they effective in shaping attitudes. Given large jury lists and the lack of homogeneity of these communities, it should always be possible to find twelve persons whose minds have not been poisoned by pre-trial sensationalism." Yale Law Journal, Vol. 59, No. 3, p. 543, Feb. 1950.

[fol. 40] 6. *Delaney* v. *U. S.* (C. A. 1, 1952), 199 F. 2d 107, 116.

7. In his reply affidavit submitted on this application, it is stated by counsel for petitioners Rosenberg that the "entire panorama" of pretrial publicity could not have been revealed to him by the "usual sporadic reading of an average newspaper reader in New York City", and that he was "unaware of the total picture." p. 3, aff. of E. Bloch, 12/2/52.

8. Record pp. 43-158.

9. The Trial record contains the following:

"The Court: You waive your last challenge?

Mr. A. Block: That is correct.

Mr. Saypol: Challenges waived and the jury is satisfactory to the Government.

The Court: Very well.

Mr. Kuntz: Satisfactory to the defendant.

The Court: Jury satisfactory all around.

Mr. E. H. Block: Satisfactory all around." (R. 152).

10. *U. S. vs. Rosenberg,* (C. A. 2, 1952), 195 F. 2d 583, 593.

11. *Smith* v. *U. S.,* (C. A. D. C. 1950), 187 F. 2d 192, *cert den.* 341 U. S. 927; *U. S. vs. Walker,* (C. A. 2, 1952) 197 F 2d, 287; *Cf. U. S. vs. Snyder,* (C. A. 2, 1947), 160 F. 2d 351.

12. *Wolf v. Colorado,* (1949) 338 U. S. 25, 27; citing *Palko v. Connecticut,* (1937), 302 U. S. 319.

13. *Frank v. Mangum,* (1915), 237 U. S. 969, 984.

14. *Shepherd v. Florida,* (1951), 341 U. S. 50, 51.

15. *Cf. Nardone v. U. S.* (1939), 308 U. S. 338, 342.

16. *U. S. vs. Weber,* (C. A. 2, 1952), 197 F. 2d 237, 239).

17. *Ryles v. U. S.,* (C. A. 10, 1952), 198 F. 2d 199, 200.

18. *U. S. vs. Heine,* (C. A. 2, 1945), 151 F. 2d 813.

19. *Gorin v. U. S.,* (1941), 312 U. S. 19, 31-32; rehearing den. 312 U. S. 713.

20. In his charge the trial judge said:

[fol. 41] APPENDIX TO OPINION

The following is a list of the points which have heretofore been raised by the petitioners.

By the petitioners, Rosenberg

In the Court of Appeals:

1. Constitutionality of Espionage Statute

a. Statute is vague and indefinite.

b. Intent provisions are vague and indefinite.

c. Statute does not establish a sufficiently certain standard of guilt.

2. Sufficiency of Indictment.

3. Conduct of Trial Judge as a Deprivation of a Fair Trial.

4. Prejudicial Instructions to Jury.

a. Special need to enforce law.
b. Distortion of defense theory.
c. Refusal to read cross-examination to jury.

5. Errors in Reception of Evidence.

a. Communist belief and affiliation as evidence of motive and intent.
b. Bentley-Julius telephone calls.
c. Theft by Rosenberg of proximity fuse.
d. Use of sketches of lens and atom bomb.
e. Receipt of Schneider testimony.

6. Sentence of Death Constituted Cruel and Unusual punishment.

In the Court of Appeals on Petition for Rehearing:

1. The Conviction violated the Treason Clause in the Constitution.
2. The Capital Punishment Portion of the Espionage Statute is Unconstitutional.

In the Supreme Court on Petition for Writ of Certiorari:

1. Constitutionality of Espionage Act under First and Fifth Amendments.
2. Sufficiency of Indictment under Sixth Amendment.
3. Whether Convictions rest on Evasion of Treason Clause.
4. Whether Conduct of Trial Judge Deprived Defendants of Fair Trial.

a. Bias of Judge.
b. Improper Instructions.
e. Distortion of Evidence.

[fol. 42] 5. Improper Receipt of Evidence.

a. Communist Evidence relating to Defendants' Intent.
b. Bentley-Julius telephone calls.
c. Schneider Testimony.

6. The Sentence of Death as Cruel and Unusual Punishment.

In the Supreme Court on Petition for Rehearing:

1. Espionage Act as construed violates Treason Clause of Constitution.
2. Espionage Act as construed rendered criminal offenses "of the same kind as treason", but not treason.
3. Proof of Criminal Intent by Imputation from Communist Affiliation was Improper.
4. Sentences were Based on Improper Factual Basis.
5. Sentences were Excessive.

By the petitioner, Sobell

In the Court of Appeals:

1. Insufficiency of Evidence.
2. Testimony showed Two Conspiracies.
3. Insufficiency of Indictment.
4. Errors in Reception of Evidence or Misconduct depriving defendant of Fair Trial.

   a. The Communist Issue as evidence of motive or intent.

   b. Evidence establishing Sobell had been deported from Mexico.

   c. Conduct of Court (relying on issue as raised by Rosenbergs).

   d. Conduct of prosecutor.

5. Court had no jurisdiction over person of Sobell because he was Forcibly Seized in a Foreign Count-y.

In the Court of Appeals on Petition for Rehearing:

1. Double conspiracy argument.
2. Error in receipt of Evidence of Political Views on Issue of Intent.
3. Denial of Fuller Bill of Particulars was Error.

In the Supreme Court on Petition for Writ of Certiorari:

1. Double conspiracy argument.
2. Whether Sobell was Denied a Fair Trial.

a. References to "treason".
b. Testimony relating to Communist Party membership and activity.
c. Conduct of trial judge and prosecutor.
d. Evidence of flight to Mexico.
e. Evidence that Defendant was deported from Mexico.

[fol. 43] 3. Sufficiency of Evidence.
4. Evasion of Treason Clause of Constitution.
5. Constitutionality of Statute and Sufficiency of Indictment.
6. Alleged kidnapping of defendant.

In the Supreme Court on Petition for Rehearing:

1. Construction of Espionage Act conflicted with Treason Clause of Constitution.
2. Proof of Communist Party membership Did Not Prove Requisite Intent.
3. Sentence was Arbitrary and Appellate Courts Should Modify It.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF ROSENBERGS TO VACATE SENTENCE—November 24, 1952

To the Honorable Judges of said Court:

The petition of Julius Rosenberg and Ethel Rosenberg, by Emanuel H. Bloch, their attorney, respectfully represents:

First: The petitioners are unjustly, unlawfully and illegally detained and imprisoned by Wilfred L. Denno, Warden of Sing Sing Prison, Ossining, New York, a New

York State penal institution, acting as the agent for and under the direction of the Attorney General of the United States or his authorized representative to whose custody they were commended, under and by virtue of separate judgments entered and commitments issued by the United States District Court for the Southern District of New York, dated and filed April 5, 1951 against each of the petitioners.[1]

Second: The indictment, against the petitioners (a superseding indictment following two previous ones) was returned in this Court on January 31, 1951 on charges, in a single count that they conspired with others, from June 6, [fol. 45] 1944 and until June 16, 1950, to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States of America" with "intent or reason to believe that they would be used to the advantage of" that foreign nation, in violation of Section 34, Title 50 of the United States Code (now 18 U.S.C.A. 794). (R. 2-4, 5, 6)

Third: Their trial, together with the co-defendant, Morton Sobell, before a Court and Jury in this Court, commenced on March 6, 1951 and continued until March 29, 1951, when the jury returned separate verdicts of guilty against each of them. (R. 35-1579)

Fourth: On April 5, 1951 they were sentenced to death by electrocution by Hon. Irving I. Kaufman, the trial judge; and, as aforementioned, the judgments and commitments were made and filed in the Office of the Clerk of this Court on said April 5, 1951. (R. 1612-20; 27, 28)

Fifth: Pursuant to the authority vested in him by the

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[1] For the convenience of the Court and of all parties to this proceeding, the printed copy of the record, filed with the Supreme Court of the United States on the petitioners' petition to that Court, as hereafter stated, is made part of the moving papers herein, and marked as to Volume I, Exhibit "A" and as to Volume II, Exhibit "B". References to this record will be made herein as "R —". All of the other exhibits hereinafter referred to are also annexed hereto and made a part thereof.

provisions of Section 4082, of Title 18 of the United States Code, the Attorney General or his authorized representative, caused and ordered the transfer of the petitioner, Ethel Rosenberg on or about April 11, 1951, and of petitioner, Julius Rosenberg on or about May 15, 1951 to the Sing Sing Prison at Ossining, New York, where they have remained and now are presently detained to await execution, since no "available, suitable and appropriate institutions" were maintained by the Federal Government within the Southern District of New York which had facilities to carry out the execution of the sentence of death of the petitioner in the manner prescribed by the judgment of conviction.

[fol. 46] Sixth: Thereafter the petitioners duly appealed to the United States Court of Appeals for the Second Circuit from the aforesaid judgments of conviction, which were stayed pending final determination of the appeal. On February 25, 1952, the United States Court of Appeals for the Second Circuit, affirmed the judgments of conviction of the petitioners. Its opinion is reported in 195 F. (2d) 582.

Seventh: Thereafter the petitioners duly petitioned the said United States Court of Appeals for the Second Circuit for a rehearing of their appeal. On April 8, 1952, the said Court denied the said petition. Its opinion is also reported in 195 F. (2d) 583.

Eighth: Thereafter the petitioners duly petitioned to the Supreme Court of the United States for a writ of certiorari to review the aforesaid decisions of the United States Court of Appeals for the Second Circuit. On October 13, 1952 the United States Supreme Court made and entered an order denying the said petition. No written opinion was rendered. Black, J., dissenting, noted his desire to grant the writ.

Ninth: Thereafter and on or about October 15, 1952, the Supreme Court of the United States, on the application of petitioners, made an order staying the issuance of its order of October 13, 1952 until its determination of a petition for a rehearing to be duly made before that Court by the petitioners.

Tenth: Thereafter and on October 28, 1952 the petitioners duly filed their petition with the Supreme Court of the United States for a rehearing and reversal of its order of October 13, 1952.

Eleventh: On November 17, 1952, the United States [fol. 47] Supreme Court made and entered an order denying petitioners' petition for a rehearing. Black, J., dissenting, noted his desire to grant the petitioners' prayer for relief. Frankfurter, J., wrote a memorandum opinion, not yet officially reported.

Twelfth: Petitioners make this application praying that their sentence be vacated and set aside and that they be discharged from detention and imprisonment under the provisions of Sec. 2255, Title 28 of the United States Code on the ground that their conviction was unjustly, unlawfully and illegally procured in violation of the Constitution and laws of the United States and the sentencing court was without jurisdiction to impose the sentence, so as to render the judgment subject to collateral attack.

Thirteenth: The grounds which petitioners urge in support of this application are as follows:

1. Pre-trial and trial publicity, bearing on the issues of the petitioners' case, adversely reflected upon their innocence, pre-conditioned the public mind in the Southern District of New York to an acceptance of their guilt, and created a trial atmosphere of prejudice and hostility toward them, through:

(a) Newspaper publicity developed by the independant initiative and private enterprise of the newspapers and other mass media of communication circulated within the Southern District of New York;

(b) Information, indicating the guilt of the petitioners "fed to" the press and other mass media of communication circulated within the City of New York by the Federal Bureau of Investigation, the Department of Justice, the office of the United States Attorney for the Southern Dis- [fol. 48] trict of New York, and other officials of Government, and reported widely by the said media of publicity;

(c) The indictment of one, William Perl, procured by the prosecuting authorities in the Southern District of New York in the course of the trial and before the verdict of the petitioners, having the effect of prejudicing the minds of the jurors sitting in the petitioners' cause against the petitioners.

2. The prosecuting authorities knowingly used false testimony to bring about petitioners' conviction.

3. The sentencing court was without jurisdiction to impose the sentence: in that the material allegedly transferred and communicated, the gravamen of the offense, was arbitrarily and capriciously classified as "secret", when in fact it was lawfully, widely and publicly known, and its transmittal or communication, therefore, not violative of Section 32 (a) and 34 of Title 50 U.S.C.A.

I

General Climate of the Case

Fourteenth: On October 10, 1952, subsequent to the trial proceedings in this case, the United States Court of Appeals, for the First Circuit, in *Delaney* v. *United States* [Number 4652, not yet reported] enunciated legal principles, not clearly established at the time of the petitioners' trial, concerning the effect of adverse "pervasive pre-trial publicity". The Court held that where an "enveloping hostile atmosphere" may result in the creation of a "public preconception of guilt", a defendant. tried under such conditions, is deprived of his rights under the Sixth Amend-
[fol. 49] ment to the Constitution of the United States.

With respect to "this modern phenomenon of 'trial by newspaper' ", where "pre-trial publicity of damaging material, tending to indicate the guilt of the defendant, is dug up by the initiative and private enterprise of newspapers", the Court stated: "The Supreme Court has not spoken its last word". It held directly that where such material is "fed to the pres by prosecuting officials of the Department of Justice" the courts must, in the interests of "the administration of criminal justice in the federal courts" go beyond even "those minimal historic safeguards . . . which are summarized as 'due process of law' ", to insure that "civilized standards of procedure and evidence" are established and maintained.

The petitioners here represent that a tremendous and almost unprecedented volume of pre-trial and trial newspaper publicity stimulated by the prosecuting officials as well as independently generated, hostile to them, had deeply ingrained in the public of the Southern District of New

York, a profound conception of their guilt. No jury chosen from among this section of the population could have escaped that influence in arriving at its verdict.

To the preconception of the petitioners' culpabality of the crime with which they were charged was added anger, hatred and resentment against them because their crime was falsely depicted to have been of a magnitude and character so as to put in jeopardy the national security of the United States and the very survival of each of its citizens.

The remarks of the trial Court on sentence reflected this type of attitude toward the petitioners which prevailed from the time of their arrests through their trial, when he [fol. 50] stated: "I consider your crime worse than murder . . . You have changed the course of history to the disadvantage of our country . . . Julius Rosenberg was the prime mover in this conspiracy . . . Ethel Rosenberg . . . encouraged and assisted the cause . . . she was a full fledged partner in this crime." (R. 1614-1616)

But within a week after the imposition of sentence upon the petitioners, a highly authoritative government report rated Fuchs, May and Greenglass (along with British, Bruno Pontecorvo) as the only important atomic espionage agents, and subordinated the petitioners to a minor place. *Report on Soviet Atomic Espionage* Joint Comm. on Atomic Energy, 82nd Cong., 1st Sess. (U.S. Gov't Printing Office, 1951) pp. 5-7. *Accord*: *The Shameful Years*, House Comm. of Un-American Activities (U.S. Gov't Printing Office, 1952).

Nevertheless, the exaggerations and distortions, documented below, of the degree of the petitioners alleged crime, prevailed in the pre-trial and trial period and created a climate of hostility which transformed the trial into a proceeding bearing the superficial trappings of due process, but devoid of the indispensable content of fairness or reasoned deliberation.

The case of the petitioners is unique in this respect: the publicity which prejudiced them consisted not alone of aspersions on their innocence, but was the accumulation of propaganda, varied in its aspects, commencing months before their arrests and continuing to and including their trial. As it became specifically directed toward them by the prosecuting officials and the mass media of communica-

tion, the petitioners were engulfed in a wave of common anger, and public opinion hardened into a certainty of their [fol. 51] individual guilt.

Only the history of the contemporaneous period explains the effectiveness and force of the lines of publicity which fastened the guilt of the petitioners in the public mind.

The years from the close of World War II to the date of the arrest and trial of the petitioners, and to the present, were marked by a growing strain and tension in the relations between the United States and the Soviet Union. The tempo of the deterioration of the international situation, by the time of the arrest of the petitioners and their trial, quickened by the outbreak of the Korean conflict, had reached the stage of "enmity", popularly referred to as the "cold war". Exploiting ideological identity of Communism here and abroad, domestic Communists had been presented to the public as suspect in their loyalty to our Government.

The deep fear of the consequences to the American people of the development of the "cold War" into a shooting war, was mitigated, from Hiroshima to 1949, by reliance on the illusion that the United States maintained a monopoly on the atom-bomb—the most frightful and devastating weapon yet developed by men. The sense of security of the people of the United States that they would be safe in any war with the Soviet Union because of their sole possession of this super-weapon was shattered when, in September 1949, the President of the United States announced that the Soviet Union had exploded an atomic bomb.

When Dr. Klaus Fuchs, the British atomic scientist—Dr. J. Robert Oppenheimer's opposite number at the Los Alamos atom-bomb project—was arrested in England, in February, 1950, the American people were given to under- [fol. 52] stand that the Soviet Union achieved mastery of the atomic weapon, when it did, only by virtue of the espionage activities of Fuchs and his cohorts, in transmitting to the Soviet Union the innermost "secrets" of American atomic bomb production. The circumstances that President Truman had publicly disclosed that he had ordered American production of the hydrogen bomb three days prior to Fuchs arrest, and the charge that Fuchs had also delivered hydrogen bomb data to the Soviet Union com-

pounded the shock. N.Y. Times, Feb. 1, 1950, p. 1 (Ex. II-A-1); N.Y. Daily Mirror, Feb. 1, 1950 p. 1 (Ex. II-D-1); N.Y. Post, Feb. 1, 1950, p. 1 (Ex. II-G-1).

The entire metropolitan press and national magazines circulated in this community, featured statements by J. Edgar Hoover, Director of the Federal Bureau of Investigation, Senator Brian McMahon, Chairman of the Congressional Committee on Atomic Energy, its individual members, the United States Atomic Energy Commission, and General Leslie R. Groves, wartime head of the over-all atomic Manhattan Engineering Project, that Fuchs had had access to our most vital and closely guarded "secrets" of the atomic and hydrogen bombs and that his transmission of this information to the Soviet Union, in all probability, was the factor which enabled the Soviet Union to bring off an atomic explosion years before the United States Government had expected it. *See, e.g.:* N. Y. Times, Feb. 4, 1950, p. 2 (Ex. II-A-2); ibid, Feb. 12, 1950, P. 10E (Rev. of Wk.) (Ex. II-A-13); N. Y. Herald Tribune, Feb. 4, 1950 p. 1 (Ex. II-B-1); ibid, Feb. 5, 1950, p. 1 (Ex. II-B-2); ibid, Feb. 7, 1950 pp. 1, 21 (Ex. II-B-4); N. Y. Daily News, Feb. 4, 1950 pp. 1, 2 (Ex. II-C-1); ibid, Feb. 5, 1950, pp. 2, 54 (Ex. II-C-2); ibid, Feb. 8, 1950 p. 36 (Ex. II-C-6); N. Y. Daily [fol. 53] Mirror, Feb. 4, 1950, pp. 1, 2 (Ex. II-D-3); N. Y. Journal American, Feb. 3, 1950, pp. 1, 4, 5 (Ex. II-E-2); ibid, Feb. 4, 1950, pp. 1, 2, 8 (Ex. II-E-3, 4); ibid, Feb. 5, 1950, p. 15 (Ex. II-E-7, 8); ibid, Feb. 10, 1950, pp. 1, 15, 16 (Ex. II-E-15-20); N. Y. World Telegram and Sun, Feb. 4, 1950 p. 1 (Ex. II-FO2); N. Y. Post, Feb. 10, 1950, pp. 1, 2, 47 (Ex. II-G-9); Time Magazine, Feb. 13, 1950, p. 24, (Ex. II-H-1); N. Y. Daily Mirror, Mar. 2, 1950, p. 3 (Ex. III-DO2); N. Y. Journal-American, Mar. 11, 1950, p. 2 (Ex. III-E-6); N. Y. Post, Mar. 2, 1950, p. 15 (Ex. III-G-2); ibid, March 12, 1950, p. 3 (Ex. III-G-4).

The U. S. Federal Bureau of Investigation, purportedly instrumental in the arrest of Fuchs, in tandem the British prosecutor of Fuchs and the presiding judge at his arraignment, trial and sentence, advanced the thesis that the motivation for Fuchs' espionage activities on behalf of the Soviet Union was ideological attachment to the principles of Communism. It was widely exploited in the metropolitan

press as "an object lesson in the meaning of modern Communism". N. Y. Times, Feb. 5, 1950, pp. 2, E-3 (Ex. II-AO4, 5); ibid, Feb. 7, 1950, p. 3 (Ex. II-A-7); ibid, Feb. 11, 1950, pp. 1, 2 (Ex. II-A-12); N. Y. Herald Tribune, Feb. 7, 1950, p. 1 (Ex. II-B-4); ibid, Feb. 11, 1950, pp. 1, 4 (Ex. II-B-8); ibid, Feb. 12, 1950, pp. 1, 3 (Section 2) (Ex. II-B-10); N. Y. Daily News, Feb. 4, 1950, pp. 1, 2, 6, 54 (Ex. II-C-1); ibid, Feb. 7, 1950, p. 8 (Ex. II-C-4); ibid, Feb. 12, 1950, p. 19 (Ex. II-C-7); ibid, Feb. 20, 1950, p. 27 (Ex. II-C-8); N. Y. Daily Mirror, Feb. 4, 1950, p. 7 (Ex. II-D-3); ibid, Feb. 6, 1950, p. 2 (Ex. II-D-8); ibid, Feb. 11, 1950, pp. 1, 3 (Ex. II-D-15-16); N. Y. Journal American, Feb. 3, 1950, pp. 1, 4 (Ex. II-E-1, 2); ibid, Feb. 6, 1950, pp. 1, 7, 16 (Ex. II-E-9, 10); ibid, Feb. 10, 1950, pp. 1, 6, 15 (Ex. II-E-15, 16, 17, [fol. 54] 18, 19, 20); N. Y. World Telegram and Sun, Feb. 6, 1950, pp. 1, 11 (Ex. II-F-3, 4); ibid, Feb. 7, 1950, p. 16 (Ex. II-F-7); ibid, Feb. 11, 1950, p. 8 (Ex. II-F-11); N. Y. Post, Feb. 6, 1950, p. 4 (Ex. II-G-4); ibid, Feb. 10, 1950, pp. 1, 2, 47 (Ex. II-C-9); ibid, Feb. 12, 1950, p. 2 (Ex. II-G-10); ibid, Feb. 13, 1950, p. 22 (Ex. II-C-11); ibid, Feb. 14, 1950, p. 32 (Ex. II-G-12); ibid, Feb. 15, 1950, p. 42 (Ex. II-G-13); Time Magazine, Feb. 13, 1950, p. 24 (Ex. II-H-1); ibid, Feb. 20, 1950, pp. 22, 23 (Ex. II-H-2); N. Y. Times, Mar. 2, 1950, pp. 1, 14 (Ex. III-A-1); N. Y. Herald Tribune, Mar. 2, 1950, pp. 1, 12 (Ex. III-B-2); N. Y. Daily News, Mar. 2, 1950, pp. 2, 41 (Ex. III-C-1); N. Y. Journal American, Mar. 1, 1950, p. 1 (Ex. III-E-1); N. Y. World Telegram and Sun, Mar. 1, 1950, p. 1 (Ex. III-F-1); N. Y. Post, Mar. 1, 1950, p. 1 (Ex. III-G-1); ibid, Mar. 5, 1950, p. 18 (Ex. III-G-3); Time Magazine Mar. 13, 1950, p. 24 (Ex. III-H-1); Newsweek, Mar. 13, 1950, p. 34 (Ex. III-H-2); N. Y. Herald Tribune, May 28, 1950 (Ex. V-B-7).

The official treatment of the Fuchs case, dramatized by its reportage, served to co-mix the political phobias which had developed in the years following World War II. There emerged, thereafter, as objects of anathema and gripping fear: (1) the fear that espionage on behalf of the Soviet Union had and would disarm us; (2) the fear that native Communists, acting as spies for the Soviet Union, would subvert our security; and (3) the fear of the consequence

of the breach of U. S. atomic monopoly, in terms of individual and mass annihilation.

These objects became matters of widespread publicity from the time of the arrest of Fuchs to and including the arrest and trial of the petitioners. From the Fuchs case there developed a chain of atomic espionage cases in which, [fol. 55] properly or improperly, all of these factors were imported.

Each of these cases was related by the officials, and, at their instigation, by the press to each prior case and each succeeding case. Thus an unbroken line of atomic espionage cases stretched from the Fuchs' case, through entire period, prior to and after, the arrest of the petitioners, and to their conviction. Explicitly and implicitly, the petitioners were linked to Fuchs and each succeeding atomic spy suspect. The prejudice of accompanying adverse publicity therefore, in fact, began for them with the arrest of Fuchs.

When Fuchs was arrested, F. B. I. Director, J. Edgar Hoover and Congressional "sources" stated that there would be ramifications in this country, that the search was on for Fuchs' accomplices, that his accomplices were known because he had identified and named them. Prosecuting officials released information that local grand juries were beginning to receive evidence concerning his American confederates and further arrests were expected in short order. N. Y. Herald Tribune, Feb. 4, 1950, pp. 1, 4 (Ex. II-B-1); ibid, Feb. 7, 1950, pp. 1, 21 (Ex. II-B-4); ibid, Feb. 8, 1950 (Ex. II-B-6); N. Y., Daily News, Feb. 4, 1950, pp. 1, 2, 6, 54 (Ex. II-C-1); ibid, Feb. 5, 1950, pp. 4, 28 (Ex. II-C-3); N. Y. Daily Mirror, Feb. 4, 1950, p. 1 (Ex. II-D-3); ibid, Feb. 5, 1950, p. 3 (Ex. II-D-5, 6); ibid, Feb. 7, 1950, p. 3 (Ex. II-D-9); ibid, Feb. 11, 1950, pp. 1, 3 (Ex. II-D-15, 16); N. Y. Journal American, Feb. 4, 1950, pp. 1, 2, 8 (Ex. II-E-3, 4, 5, 6); ibid, Feb. 5, 1950, pp. 1, 15 (Ex. II-E-7, 8); ibid, Feb. 6, 1950, pp. 1, 7, 23 (Ex. II-E-9, 10, 11); N. Y. World Telegram & Sun, Feb. 4, 1950, pp. 1, 2 (Ex. II-F-2); ibid, Feb. 6, 1950, p. 11 (Ex. II-F-4); ibid, Feb. 7, 1950, pp. 1, 9, 16 (Ex. II-F-5, 6, 7); ibid, Feb. 13, 1950 p. 2 (Ex. II-F-12); N. Y. Post, Feb. 6, 1950, p. 4 (Ex. II-G-4); ibid, Feb. 24, [fol. 56] 1950, p. 6 (Ex. II-G-15); N. Y. Daily News, Mar. 7, 1950, p. 19 (Ex. III-C-3); ibid, March 9, 1950, p. 1 (Ex.

III-C-4); N. Y. Daily Mirror, Mar. 7, 1950, p. 4 (Ex. III-D-1); N. Y. Journal American, Mar. 2, 1950, (Ex. III-E-3); N. Y. World Telegram & Sun, Mar. 4, 1950, p. 2 (Ex. III-F-4); ibid, Mar. 20, 1950, p. 4 (Ex. III-F-7); N. Y. Post, Mar. 1, 1950, p. 1 (Ex. III-G-1); ibid, March 2, 1950, p. 14 (Ex. III-G-2).

On May 24, 1950, Harry Gold, an American, was arrested on the charge of conspiring to commit espionage on behalf of the Soviet Union by transmitting to agents of that country information relating to the national defense of the United States.

This first American arrest, on a crime carrying the death penalty, produced a hysteria which became more frenzied with the reports of frantic Federal Bureau of Investigation activity to apprehend the "Russian agents" before they "fled" the country. These reports were officially inspired as was the added revelation that the authorities were guarding all ports, harbors, stations and airfields to prevent their escape. When this is co-nterposed against the information, easily discoverable, and subsequently introduced at the trial of the petitioners, that Anatoli A. Yakovlev (a co-conspirator of Gold and co-defendant of the petitioners) and his family had left the country after openly booking Class A passage on the S. S. America in 1946 (R. 945-6), it becomes clear that the hysteria was artificially induced. And, in every story thereafter appearing, in which the petitioners were mentioned, Yakovlev's name was introduced, to the prejudice of the petitioners, as a co-conspirator who had "fled" the country. (See documentation cited in the succeeding paragraph.)

[fol. 57] The official pronouncements, reported by the metropolitan press linked Gold to Fuchs. It also joined Gold with the alleged American espionage agents, Elizabeth Bentley, who testified at, and Jacob Golos, named in suspicious connection with Rosenberg, at the trial of the petitioners (R. 996-1023). N. Y. Times, May 24, 1950, p. 1 (Ex. V-A-5); ibid, May 25, 1950, p. 1 (Ex. V-A-6); N. Y. Herald Tribune, May 25, 1950, p. 1 (Ex. V-B-5); ibid, May 28, 1950, (Ex. V-B-7); ibid, May 31, 1950, (Ex. V-B-8); N. Y. Daily Mirror, May 24, 1950, p. 3 (Ex. V-D-7); ibid, May 25, pp. 1, 3 (Ex. V-D-8); N. Y. Journal American, May 24, 1950, pp. 1, 18, 19 (Ex. V-D-1, 2, 3); N. Y. World

Telegram & Sun, May 24, 1950, pp. 1, 5 (Ex. V-F-6, 7); N. Y. Post, May 24, 1950, pp. 1, 2 (Ex. V-g-1); ibid, May 25, 1950, pp. 1, 2, 36 (Ex. V-G-2).

At the same time officials and the newspapers persisted in reporting that Fuchs, in co-operation with F.B.I. agents in London, was implicating other Americans as his espionage contacts. Speculative estimates on the number of people he would name ranged from 10 to 100. N. Y. Herald Tribune, May 26, 1950, (Ex. V-B-6); N. Y. Daily News, May 24, 1950, pp. 1, 3, 50 (Ex. V-C-3, 4, 5); ibid, May 25, 1950, pp. 2, 50 (Ex. V-C-6); N. Y. Daily Mirror, May 25, 1950, pp. 1, 3, 53 (Ex. V-D-8); ibid, May 26, 1950, p. 6 (Ex. V-D-9); N. Y. Journal American, May 24, 1950, pp. 1, 16, 18, 19, 26 (Ex. V-E-1, 2, 3, 4); ibid, May 25, 1950, pp. 1, 15 (Ex. V-E-5, 6); N. Y. World Telegram and Sun, May 5, 1950, p. 10 (Ex. V-f-2); ibid, May 25, 1950, pp. 1, 2 (Ex. V-F-8); ibid, May 29, 1950, p. 4 (Ex. V-F-10); ibid, May 31, 1950, p. 34 (Ex. V-F-11); N. Y. Post, May 24, 1950, pp. 1, 2, 54, 58 (Ex. V-G-1).

[fol. 58] All the proceedings in the Gold case following his arrest, as well as his testimony against other of his alleged confederates at their trial, received unusually prominent treatment in the press in this District and kept alive in the public mind through the entire period terminating with the trial of the petitioners, the misdeeds of Gold and Fuchs. As with Fuchs, reports of official "tips" that Gold was "talking" about others allegedly connected with him in Soviet espionage, served to associate future suspects with his criminal activities. This background facilitated the forging of a prejudicial nexus between Rosenberg and Gold, although Gold, when he subsequently testified at the petitioners' trial never claimed that he met or knew the Rosenbergs. (R. 798-848). N. Y. Times, June 2, 1950, p. 11 (Ex. VI-A-1); ibid, June 10, 1950, pp. 1, 3 (Ex. VI-A-5); ibid, June 13, 1950, p. 14 (Ex. VI-A-6); N. Y. Herald Tribune, June 1, 1950, pp. 1, 13 (Ex. VI-B-1); ibid, June 2, 1950, p. 4 (Ex. VI-B-2); ibid, June 10, 1950 (Ex. VI-B-4); ibid, June 13, 1950 (Ex. VI-B-5, N. Y. Daily News, June 1, 1950, p. 6 (Ex. VI-C-1); ibid, June 10, 1950, pp. 2, 6 (Ex. VI-C-2); N. Y. Journal American, June 9, 1950, p. 1 (Ex. VI-E-1); N. Y. Times, July 21, 1950, p. 8 (Ex. VII-

A-7); N. Y. Herald Tribune, July 21, 1950 (Ex. VII-B-3); N. Y. Daily News, July 21, 1950, p. 4 (Ex. VII-C-4); N. Y. Daily Mirror, July 21, 1950, p. 2 (Ex. VII-D-6); N. Y. Journal American, July 20, 1950, p. 1 (Ex. VII-E-5); N. Y. Post, July 20, 1950, p. 2 (Ex. VII-G-3); N. Y. Herald Tribune, Aug. 1, 1950 (Ex. VIII-B-1); ibid, Aug. 3, 1950 (Ex. VIII-B-2); N. Y. Post, Aug. 16, 1950, p. 4 (Ex. VIII-[fol. 59] G-2); N. Y. Times, Nov. 16, 1950, pp. 1, 18 (Ex. XI-A-1); ibid, Nov. 18, 1950, p. 9 (Ex. XI-A-3); ibid, Nov. 21, 1950, p. 14 (Ex. XI-A-4); ibid, Nov. 22, 1950, p. 5 (Ex. XI-A-5); N. Y. Herald Tribune, Nov. 16, 1950 (Ex. XI-B-4); ibid, Nov. 17, 1950, p. 14 (Ex. XI-B-5); ibid, Nov. 21, 1950, p. 16 (Ex. XI-B-6); ibid, Nov. 22, 1950 (Ex. XI-B-7); N. Y. Daily News, Nov. 16, 1950, p. 6 (Ex. XI-C-4); ibid, Nov. 17, 1950, p. 36 (Ex. XI-C-5); ibid, Nov. 22, 1950, p. 10 (Ex. XI-C-6); N. Y. Daily Mirror, Nov. 16, 1950, p. 2 (Ex. XI-D-3); ibid, Nov. 17, 1950, pp. 2, 34 (Ex. XI-D-4); ibid, Nov. 18, 1950, p. 5 (Ex. XI-D-5); ibid, Nov. 21, 1950, p. 6 (Ex. XI-D-6); N. Y. Journal American, Nov. 16, 1950, p. 4 (Ex. XI-E-6); ibid, Nov. 17, 1950, p. 7 (Ex. XI-E-8, 9); ibid, Nov. 20, 1950, p. 13 (Ex. XI-E-10); ibid, Nov. 21, 1950, p. 4 (Ex. XI-E-12); ibid, Nov. 22, 1950, p. 3 (Ex. XI-E-13); N. Y. Telegram and Sun, Nov. 16, 1950, p. 16 (Ex. XI-F-2); ibid, Nov. 17, 1950, p. 3 (Ex. XI-F-3); N. Y. Post, Nov. 16, 1950, p. 3 (Ex. XI-G-4); ibid, Nov. 20, 1950, p. 7 (Ex. XI-G-5); ibid, Nov. 21, 1950, p. 4 (Ex. XI-G-6); ibid, Nov. 22, 1950, p. 4 (Ex. XI-G-7); N. Y. Times, Dec. 10, 1950, pp. 1, 19 (Ex. XII-A-1); N. Y. Herald Tribune, Dec. 8, 1950 (Ex. XII-B-7); ibid, Dec. 10, 1950, pp. 1, 42 (Ex. XII-B-8); N. Y. Daily News, Dec. 10, 1950, p. 2 (Ex. XII-C); N. Y. Daily Mirror, Dec. 10, 1950, p. 4 (Ex. XII-D-); N. Y. Journal American, Dec. 9, 1950, p. 1 (Ex. XII-E-4); ibid, Dec. 10, 1950, p. 1 (Ex. XII-E-5); N. Y. World Telegram and Sun, Dec. 9, 1950, p. 1 (Ex. XII-F-2); N. Y. Post, Dec. 7, 1950, p. 5 (Ex. XII-G-1); N. Y. Times, March 16, 1951, pp. 1, 8 (Ex. XV-A-10); N. Y. Herald Tribune, Mar. 16, 1951, p. 1 (Ex. XV-B-9); N. Y. Daily News, Mar. 16, 1951, p. 8 (Ex. XV-C-11); N. Y. Daily Mirror, Mar. 16, 1951, p. 12 (Ex. XV-D-8); N. Y. Journal American, Mar. 16, 1951, p. 22 (Ex. [fol. 60] VI-E-11); N. Y. World Telegram and Sun, Mar.

16, 1951, p. 3 (Ex. XV-F-9); N. Y. Post, Mar. 16, 1951, p. 4 (Ex. XV-G-9).

On June 15, 1950, Alfred Dean Slack, a chemist, was arrested on charges of espionage and was connected directly to Gold and Fuchs. These latter were, by now, commonly characterized as the Fuchs-Gold "Atom-Spy" ring. Although the charge against Slack was that he had illegally transferred information concerning RDX (a high explosive) to Gold, he was nevertheless united with the "Atom-Spy" ring. His arrest and subsequent plea of guilty in September, 1950 and his sentence in that month likewise were given front page attention. N. Y. Times, June 16, 1950, pp. 1, 4 (Ex. VI-A-12); N. Y. Herald Tribune, June 16, 1950, pp. 1, 11 (Ex. VI-B-6); ibid, June 12, 1950 (Ex. VI-B-9); N. Y. Daily News, June 16, 1950, pp. 2, 48 (Ex. VI-C-3); N. Y. Daily Mirror, June 16, 1950, pp. 1, 3 (Ex. VI-D-3); N. Y. Post, June 16, 1950, pp. 1, 3 (Ex. VI-G-4, 5); N. Y. Times, Sept. 19, 1950, p. 20 (Ex. IX-A-4); ibid, Sept. 23, 1950, p. 2-E (Ex. IX-A-8).

Again, as in the instances of Fuchs and Gold, "sources close to the Justice Department" announced to the press that there would follow many more arrests. See: *e. g.* N. Y. Daily News, June 16, 1950, pp. 2, 48 (Ex. VI-C-3).

On June 16, 1950, immediately in the wake of Slack's arrest, David Greenglass, the main prosecution witness in the trial against these petitioners, was apprehended, arrested, and on the following day arraigned. Sensational stories occupying top space in the metropolitan newspapers accom-[fol. 61] panied his seizure and the Government's charges against him. Greenglass was tied in by official announcement and widespread independent newspaper reporting and comment with Fuchs, Gold and Slack and was labelled as one of the members of the Fuchs-Gold "Atomic Espionage" ring. The Slack indictment, however, associated him only with Gold. Each step in the prosecution against Greenglass, was accorded constant and inordinately prime treatment for many months thereafter. As with the others, predictions were made by the investigative and prosecuting authorities of the Government, together, with other prominent persons in public life, that he was "talking" and that further arrests would result as a consquence of his con-

fessions. N. Y. Times, June 17, 1950, pp. 1, 2 (Ex. VI-A-13); ibid, June 24, 1950, p. 2 (Ex. VI-A-15); N. Y. Herald Tribune, June 17, 1950, pp. 1, 6 (Ex. VI-B-7); ibid, June 18, 1950, p. 6 (Ex. VI-B-8); ibid, June 24, 1950 (Ex. VI-B-10); N. Y. Daily News, June 17, 1950, pp. 1, 3 (Ex. VI-C-4); ibid, June 18, 1950, p. 10 (Exs. VI-C-5); N. Y. Daily Mirror, June 17, 1950, pp. 1, 3 (Ex. VI-D-4); N. Y. Journal American, June 16, 1950, p. 1 (Ex. VI-E-4, 5); ibid, June 17, 1950, pp. 1, 5 (Ex. VI-E-6); ibid, June 23, 1950, p. 4 (Ex. VI-E-9); N. Y. Post, June 16, 1950, pp. 1, 3 (Ex. VI-G-2); ibid, June 18, 1950, pp. 1, 3, 6 (Ex. VI-G-3); N. Y. Herald Tribune Aug. 1, 1950, (Ex. VIII-B); ibid, Aug. 3, 1950 (Ex. VIII-B-2); N. Y. Times, Oct. 19, 1950, p. 16 (Ex. X-A-5); N. Y. Herald Tribune, Oct. 19, 1950, pp. 1, 23 (Ex. X-B-2); N. Y. Daily News, Oct. 19, 1950, p. 3 (Ex. X-C-2); N. Y. Daily Mirror, Oct. 1950, p. 5 (Ex. X-D-2); N. Y. Journal American, Oct. 18, 1950, p. 1 (Ex. X-E-2); N. Y. World Telegram and Sun, Oct. 18, 1950, p. 23 (Ex. X-F-3).

[fol. 62] On July 17, 1950, the petitioner, Julius Rosenberg, was arrested and arraigned late that night before a United States District Court Judge. Following the pattern set by the preceding arrests mentioned above, he was linked with Fuchs, Gold, Slack and Greenglass in an "atom-spy" conspiracy. Again, as in the previous arrests, the officials and the press noted that more arrests would result. In relation to its coverage on the proceedings of the petitioner, Julius Rosenberg, which followed his arrest, the press meticulously recounted, either independently or as a report of official announcement, the stories and history of the Fuchs proceedings, the Gold proceedings, the Slack proceedings, the Greenglass proceedings and held the petitioner, Julius Rosenberg, to be part of the Fuchs-Gold-Slack-Greenglass atomic espionage conspiracy, and criminally responsible for its operations. The arrest of the petitioner, Julius Rosenberg, was stridently headlined in all of the metropolitan press and was acknowledged as most important news by columnists, feature story writers and other commentators. N. Y. Times, July 18, 1950, p. 1 (Ex. VII-A-3); ibid, July 19, 1950, p. 20 (Ex. VII-A-4); ibid, July 20, 1950, pp. 9, 18 (Ex. VII-A-5, 6); ibid, July 23, 1950, pp. 2E, 10E (Rev. of Wk.) (Ex. VII-A-8); N. Y.

Herald Tribune, July 18, 1950, pp. 1, 15 (Ex. VII-B-1); ibid, July 19, 1950 (Ex. VII-B-2); N. Y. Daily News, July 18, 1950, pp. 1, 3, 24 (Ex. VII-C-1); ibid, July 19, 1950, p. 6 (Ex. VII-C-2); ibid, July 20, 1950, p. 49 (Ex. VII-C-3); ibid, July 31, 1950, p. 8 (Ex. VII-C-6); N. Y. Daily Mirror, July 18, 1950, pp. 1, 2 (Ex. VII-D-2, 3); ibid, July 19, 1950, p. 2 (Ex. VII-D-4); ibid, July 20, 1950, p. 6 (Ex. VII-D-5); N. Y. Journal American, July 18, 1950, pp. 1, 8 (Ex. [fol. 63] VII-E-3); ibid, July 20, 1950, p. 1 (Ex. VII-E-5); ibid, July 29, 1950 p. 1 (Ex. VII-E-8); N. Y. Post, July 18, 1950, pp. 2, 14 (Ex. VII-C-1); ibid, July 19, 1950 p. 33 (Ex. VII-G-2); N. Y. Times, Aug. 18, 1950, p. 7 (Ex. VIII-A-18); ibid, Aug. 24, 1950, p. 20 (Ex. VII-A-25); N. Y. Herald Tribune, Aug. 18, 1950 (Ex. VIII-B-7); ibid, Aug. 24, 1950, p. 10 (Ex. VIII-B-10); N. Y. Daily News, Aug. 18, 1950, p. 23 (Ex. VIII-C-4); ibid, Aug. 24, 1950, pp. 1, 11 (Ex. VIII-C-6); N. Y. Daily Mirror, Aug. 18, 1950, p. 5 (Ex. VIII-D-10); N. Y. Journal American, Aug. 12, 1950, p. 2 (Ex. VIII-E-6); ibid, Aug. 13, 1950, pp. 1, 4 (Ex. VIII-E-7); ibid, Aug. 17, 1950, p. 3 (Ex. VIII-E-9); ibid, Aug. 23, 1950, pp. 2, 28 (Ex. VIII-E-14, 15); N. Y. Post, Aug. 17, 1950, p. 4 (Ex. VIII-G-3); ibid, Aug. 23, 1950, p. 56 (Ex. VIII-G-6); N. Y. Times, Sept. 23, 1950, pp. 7, 32 (Ex. IX-A-13); N. Y. Journal American, Sept. 22, 1950, p. 10 (Ex. IX-E-2); N. Y. World Telegram and Sun, Oct. 6, 1950, p. 16 (Ex. X-F-1); ibid, Oct. 16, 1950, p. 2 (Ex. X-F-2); N. Y. Times, Feb. 14, 1951, p. 12 (Ex. XIV-A-1); ibid, Mar. 1, 1951, p. 14 (Ex. VX-A-1); N. Y. Daily News, Mar. 1, 1951, p. 21 (Ex. XV-C-1);

Within two weeks after the arrest of the petitioner, Julius Rosenberg, there were arrested in this City, Abraham Brothman and Miriam Moskowitz, charged with conspiracy to obstruct justice, in that they induced Gold to testify falsely before a Grand Jury concerning his espionage activity. Despite the form of charge, these two were depicted in the press as part of the Fuchs-Gold "Atom-Spy" ring. They were linked by the United States officials and by the press to Fuchs, Gold, Slack, Bentley, and Golos and to Greenglass and the petitioner, Rosenberg, although no connection was so made at petitioners' trial.

[fol. 64] The pattern of prediction of further arrests accompanied the press reception of the Brothman-Moskowitz

arrests. N. Y. Times, July 30, 1950, p. 1 (Ex. VII-A-14); ibid, July 31, 1950, p. 8 (Ex. VII-A-15); N. Y. Herald Tribune, July 30, 1950, pp. 1, 21 (Ex. VII-B-7); ibid, July 31, 1950, (Ex. VII-B-8); N. Y. Daily News, July 30, 1950, pp. 1, 2, 48 (Ex. VII-C-5); ibid, July 31, 1950 p. 8 (Ex. VII-C-6); N. Y. Daily Mirror, July 30, 1950, p. 2 (Ex. VII-D-8); ibid, July 31, 1950, p. 2 (Ex. VII-D-9); N. Y. Journal American, July 30, 1950, p. 1 (Ex. VII-E-9); ibid, July 31, 1950, p. 3 (Ex. VII-E-10); N. Y. Times, Aug. 1, 1950, p. 18, (Ex. VIII-A-1); ibid, Aug. 3, 1950, p. 10 (Ex. VIII-A-2); ibid, Aug. 9, 1950, p. 10 (Ex. VIII-A-7); N. Y. Herald Tribune, Aug. 3, 1950 (Ex. VIII-B-2); ibid, Aug. 9, 1950 (Ex. VIII-B-3); N. Y. Daily News, Aug. 1, 1950, p. 6 (Ex. VIII-C-1); N. Y. Daily Mirror, Aug. 1, 1950, p. 4 (Ex. VIII-D-1); N. Y. Journal American, Aug. 2, 1950, p. 26 (Ex. VIII-E-1); ibid, Aug. 8, 1950, p. 3 (Ex. VIII-E-3); Time Magazine, Aug. 7, 1950, pp. 11, 15 (Ex. VIII-H-); Newsweek, Aug. 7, 1950, p. 29 (Ex. VIII-H-).

The trial of Brothman and Moskowitz occurred in November, 1950. During this month the press was blanketed with reports of the trial, giving special emphasis to the testimony of Gold and Bentley, who were witnesses for the prosecution against these two and both of whom appeared as witnesses in the trial of the petitioners. In the accounts, the press never neglected to recall the entire chain of circumstances and arrests, beginning with Fuchs, continuing to and including all of the persons apprehended on "atom-spy" charges prior to the trial. The trial formally for conspiracy to obstruct justice was transformed, in harmony with the testimony there adduced into another trial for espionage, maintaining the omnipresence of Soviet spying. N. Y. Times, Nov. 15, 1950, p. 17 (Ex. XI-A-1); [fol. 65] ibid, Nov. 16, 1950, p. 1, 18, (Ex. XI-A-2); ibid, Nov. 18, 1950, p. 9 (Ex. XI-A-3); ibid, Nov. 21, 1950, p. 14 (Ex. XI-A-4); ibid, Nov. 22, 1950, p. 5 (Ex. XI-A-5); ibid, Nov. 23, 1950, p. 1 (Ex. XI-A-6); ibid, Nov. 29, 1950, p. 25 (Ex. XI-A-7); N. Y. Herald Tribune, Nov. 9, 1950 (Ex. XI-B-1); ibid, Nov. 11, 1950 (Ex. XI-B-2); ibid, Nov. 14, 1950, p. 12 (Ex. XI-B-3); ibid, Nov. 16, 1950, (Ex. XI-B-4); ibid, Nov. 17, 1950, p. 14 (Ex. XI-B-5); ibid, Nov. 21, 1950, p. 16 (Ex. XI-B-6); ibid, Nov. 22, 1950 (Ex. XI-B-7); ibid,

Nov. 23, 1950, p. 1 (Ex. XI-B-8); ibid, Nov. 29, 1950, p. 1 (Ex. XI-B-9); N. Y. Daily News, Nov. 8, 1950, p. 10, (Ex. XI-C-E); ibid, Nov. 9, 1950, p. 10 (Ex. XI-C-2); ibid, Nov. 15, 1950, p. 2, 50 (Ex. XI-C-3); ibid, Nov. 16, 1950, p. 6 (Ex. XI-C-4); ibid, Nov. 17, 1950, p. 36 (Ex. XI-C-5); ibid, Nov. 22, 1950, p. 10 (Ex. XI-C-6); ibid, Nov. 23, 1950 pp. 2, 46 (Ex. XI-C-7); ibid, Nov. 29, 1950, p. 8 (Ex. XI-C-8); N. Y. Daily Mirror, Nov. 9, 1950, p. 5 (Ex. XI-D-1); ibid, Nov. 14, 1950, p. 3 (Ex. XI-D-2); ibid, Nov. 16, 1950, p. 2 (Ex. XI-D-3); ibid, Nov. 17, 1950, pp. 2, 34 (Ex. XI-D-4); ibid, Nov. 18, 1950, p. 5 (Ex. XI-D-5); ibid, Nov. 21, 1950, p. 6 (Ex. XI-D-6); ibid, Nov. 22, 1950, pp. 2, 18 (Ex. XI-D-7); ibid, Nov. 23, 1950, p. 2 (Ex. XI-D-8); ibid, Nov. 29, 1950, p. 4 (Ex. XI-D-9); N. Y. Journal American, Nov. 13, 1950, p. 3 (Ex. XI-E-1); ibid, Nov. 14, 1950, p. 2 (Ex. XI-E-2); ibid, Nov. 15, 1950, pp. 1, 6 (Ex. XI-E-4); ibid, Nov. 16, 1950, p. 4 (Ex. XI-E-6); ibid, Nov. 17, 1950 p. 7 (Ex. XI-E8, 9); ibid Nov. 20, 1950, p. 13 (Ex. XI-E-10); ibid, Nov. 21, 1950, pp. 2, 4 (Ex. XI-E-11); ibid, Nov. 22, 1950, p. 3 (Ex. XI-E-13); ibid, Nov. 28, 1950, p. 1 (Ex. XI-E-14); N. Y. World Telegram and Sun, Nov. 15, 1950, p. 3 (Ex. XI-F-1); ibid, Nov. 16, 1950, p. 16 (Ex. XI-F-2); ibid, Nov. 17, 1950, p. 3 (Ex. XI-F-3); ibid, Nov. 28, 1950, p. 22 (Ex. XI-F-5); N. Y. Post, Nov. 8, 1950, p. 30 (Ex. XI-G-1); ibid, Nov. 13, [fol. 66] 1950, p. 7 (Ex. XI-G-2); ibid, Nov. 15, 1950, p. 5 (Ex. XI-G-3); ibid, Nov. 16, 1950, p. 3 (Ex. XI-G-4); ibid, Nov. 20, 1950, p. 7 (Ex. XI-G-5); ibid, Nov. 21, 1950, p. 4 (Ex. XI-G-6); ibid, Nov. 22, 1950 p. 4 (Ex. XI-G-7); ibid, Nov. 24, 1950, p. 48 (Ex. XI-G-8); ibid, Nov. 28, 1950, p. 3 (Ex. XI-G-9).

In the meantime and on or about August 11, 1950, within two weeks after the Brothman and Moskowitz arrests, the petitioner, Ethel Rosenberg, was arrested, arraigned, and, as with her husband, the petitioner, Julius Rosenberg, was held in $100,000.00 bail. The propaganda line of publicity ran true to form—the petitioner, Ethel Rosenberg, was linked not only to her husband and her brother, David Greenglass, who were indicted with her but also with Fuchs, Gold, Slack, Brothman and Moskowitz, who were not. There was a prognostication, again, of further arrests by the prosecuting officials and the entire press. Her arrest pro-

voked a spate of publicity. N. Y. Times, Aug. 12, 1950, pp. 1, 30 (Ex. VIII-A-11); N. Y. Herald Tribune, Aug. 12, 1950, p. 5 (Ex. VIII-B-5); N. Y. Daily News, Aug. 12, 1950, p. 2 (Ex. VIII-C-2); ibid, Aug. 16, 1950, p. 16 (Ex. VIII-C-3); N. Y. Daily Mirror, Aug. 12, 1950, pp. 2, 6 (Ex. VIII-D-8); N. Y. Journal American, Aug. 11, 1950, p. 1 (Ex. VIII-E-5); ibid, Aug. 12, 1950, p. 2 (Ex. VIII-E-6); ibid, Aug. 13, 1950 p. 4 (Ex. VIII-E-7).

The press coverage of her case thereafter merged with that of her husband, the petitioner, Julius Rosenberg. (See documentation *supra*, concerning Julius Rosenberg.)

Within a week of the arrest of the petitioner, Ethel Rosenberg, Morton Sobell, a co-defendant, was arrested [fol. 67] in Laredo, Texas, allegedly having been deported from Mexico to where he was charged with having fled as an intermediate point for further flight to countries behind the "iron curtain". His alleged flight was attributed to his desire to avoid responding to criminal charges of espionage. According to official sources, it was prompted by Rosenberg, although such proof was never produced. Sobell was stamped by the public press, as a result of official announcement, as an "atom-spy" and a member of the Fuchs-Gold "Atomic Espionage" ring, although at his subsequent trial there was no attempt on the part of the prosecution to link him with any activities involving atomic bomb information, nor with Fuchs or Gold. Of course, Sobell was entwined with the petitioners, a fact, in the light of the foregoing, which re-enforced the connection to the public, of the petitioners with Fuchs and Gold.

Sobell's removal proceedings from Texas to New York City to answer a criminal complaint in the Southern District of New York and the question of his bail upon arraignment were played upon by the newspapers, independently, until his proceedings, too, were merged with the petitioners'. N. Y. Times, Aug. 19, 1950, pp. 1, 6 (Ex. VIII-A-19); ibid, Aug. 20, 1950, p. 23 (Ex. VIII-A-20); ibid, Aug. 25, 1950, p. 5 (Ex. VIII-A-26); N. Y. Herald Tribune, Aug. 19, 1950, pp. 1, 18 (Ex. VIII-B-8); ibid, Aug. 20, 1950, p. 16 (Ex. VIII-8-B); ibid, Aug. 25, 1950, p. 5 (Ex. VIII-B-11); N. Y. Daily News, Aug. 19, 1950, p. 2 (Ex. VIII-C-5); ibid, Aug. 25, 1950, p. 17 (Ex. VIII-C-7); N. Y. Daily Mirror, Aug. 10,

1950, pp. 2, 6 (Ex. VIII-D-11); ibid, Aug. 20, 1950, p. 15 (Ex. VIII-D-12); ibid, 23, 1950, p. 2 (Ex. VIII-D-13); ibid, Aug. 24, 1950, p. 24 (Ex. VIII-D-14); N. Y. Journal American, Aug. 18, 1950, pp. 1, 10 (Ex. VIII-E-11); ibid, Aug. 19, 1950, pp. 1, 2 (Ex. VIII-E-12); ibid, Aug. 20, 1950, pp. 1, 4 (Ex. VIII-E-13); N. Y. Post, Aug. 18, 1950, p. 2 [fol. 68] Ex. VIII-G-4); ibid, Aug. 20, 1950, p. 23 (Ex. VIII-G-5); Newsweek Aug. 28, 1950, p. 30 (Ex. VII-H).

The 1950 and early 1951 period was punctuated with accusations against many persons, informally, although publicly, charged with espionage activities. In September, 1950, one, Oscar Vago a former business associate of Gold, was indicted for perjury, in a Grand Jury investigation concerning espionage. N. Y. Times, Sept. 29, 1950, p. 17 (Ex. XI-A-17); N. Y. Daily Mirror, Sept. 29, 1950, p. 2 (Ex. XI-D-4); N. Y. Journal American, Sept. 28, 1950, p. 1 (Ex. XI-E-5); N. Y. World Telegram and Sun, Sept. 29, 1950, p. 3 (Ex. XI-F-3); In August, one, Simon, a young engineer was indicted for theft of plutonium from Los Alamos, where he had formerly been employed. N. Y. Times, Aug. 23, 1950, p. 1 (Ex. VIII-A-23). Doubt, in general, was sought to be cast on our atomic scientists by Congressional committee hearings centering on the alleged Communist political association of a group of our leading scientists at the Berkeley, California Experimental Laboratories. The situation became so wild that the press and officials, like Senator McCarthy, brought into question the loyalty of every American atomic scientist, including such outstanding contributors to the development of nuclear physics as Drs. Mather, Urey and Hutchins. No espionage indictments were ever returned against such others as Steve Nelson, Sidney Weinberg ("Scientist X"), Clarence E. Hiskey and Arthur Adams, among others, but the climate was aggravated by constant criticisms of the press against the Government because it had failed to do so. N. Y. Daily Mirror, Feb. 12, 1950 p. 20 (Ex. II-D-16); N. Y. Journal American, Feb. 8, 1950, p. 17 (Ex. II-E-14); [fol. 69] ibid, Feb. 12, 1950 p. 1 (Ex. II-E-21, 24); ibid, Feb. 13, 1950, p. 1, 4 (Ex. II-E-27, 28); ibid, Feb. 14, 1950, pp. 1, 14 (Ex. II-E-29, 30); ibid Feb. 15, 1950, pp. 1, 7 (Ex. II-E-31, 32); ibid, Feb. 16, 1950, pp. 1, 5 (Ex. II-E-33, 34);

ibid, Feb. 17, 1950, p. 9 (Ex. II-E-35); N. Y. Times, March 3, 1950, p. 8 (Ex. III-A-2); ibid, March 8, 1950 p. 5 (Ex. III-A-5); N. Y. Herald Tribune, March 8, 1950, p. 1 (Ex. III-B-6); ibid, March 22, 1950, p. 1 (Ex. III-B-10); ibid, March 28, 1950 p. 1 (Ex. III-E-11); N. Y. World Telegram and Sun, March 21, 1950, p. 1 (Ex. III-F-8); ibid, March 24, 1950, p. 13 (Ex. III-F-9); U. S. News and World Report April 21, 1950 (Ex. IV-H-); N. Y. Times, May 5, 1950, p. 4 (Ex. V-A-2); N. Y. World Telegram and Sun, May 4, 1950, p. 5 (Ex. V-F-1); ibid, May 10, 1950, pp. 4, 37 (Ex. V-F-3); ibid, May 12, 1950, p. 8 (Ex. V-F-5); N. Y. Times, June 17, 1950, pp. 1, 3 (Ex. VI-A-13); ibid, June 24, 1950 p. 2 (Ex. VI-A-15); N. Y. World Telegram and Sun, June 5, 1950, p. 21 (Ex. VI-F-1); N. Y. Times, Aug. 23, 1950, p. 23 (Ex. VIII-A-24); N. Y. World Telegram and Sun, Oct. 23, 1950, pp. 13, 14 (Ex. X-F-4); N. Y. Journal American, Nov. 28, 1950, p. 2 (Ex. XI-E-15); N. Y. World Telegram and Sun, Nov. 21, 1950, p. 18 (Ex. XI-F-4); N. Y. Times, Dec. 21, 1950, p. 9 (Ex. XII-A-2); N. Y. World Telegram and Sun, Dec. 4, 1950, p. 14 (Ex. XII-F-1).

Throughout the entire year of 1950 and up to and including the trial of the petitioners in 1951, there were repeated harangues by public officials, warning the public against the general danger of espionage. J. Edgar Hoover, Director of the Federal Bureau of Investigation, asserted on many occasions that Communist espionage activity had reached a new high which far exceeded the dangers from espionage during World War II. President Truman, himself, issued a statement dealing specifically with espionage, [fol. 70] urging all citizens to report any suspicious activity which may come to their knowledge to the FBI without delay. The Department of Justice announced that additional juries were being impanelled to hear spy cases. In the metropolitan district of New York, according to the announcement of Mr. Irving H. Saypol, the then U. S. Attorney for the District, six additional grand juries were being called for this purpose. N. Y. Times, Feb. 8, 1950, pp. 1, 13 (Ex. II-A-8); N. Y. Journal American, Feb. 8, 1950, p. 17 (Ex. II-E-14); N. Y. World Telegram and Sun Feb. 8, 1950, pp. 9, 16 (Ex. II-F-8, 9); N. Y. Herald Tribune, June 9, 1950, p. 1 (Ex. VI-B-3); N. Y. Times, July 25, 1950,

p. 1 (Ex. VII-A-9); ibid, July 28, 1950, p. 8 (Ex. VII-A-12); ibid, July 29, 1950, p. 28 (Ex. VII-A-13); N. Y. Herald Tribune, July 25, 1950 (Ex. VII-B-4); ibid, July 29, 1950 p. 1 (Ex. VII-B-6); N. Y. Journal American, Aug. 8, 1950, p. 1 (Ex. VIII-E-2); N. Y. World Telegram and Sun, Jan. 9, 1951, p. 13 (Ex. XIII-F-4); N. Y. Times, Feb. 28, 1951 p. 5 (Ex. XIV-A-3); ibid, March 22, 1951, p. 1, 37 (Ex. XV-A-14); N. Y. World Telegram and Sun, March 23, 1951, p. 11 (Ex. XV-F-13).

The frenetic appeals within and without Congressional halls for an amendment of the espionage laws to inflict the death penalty for espionage in peace time measures the temper of the time. N. Y. Times, April 2, 1950, p. 1 (Ex. IV-A-1); ibid, Aug. 19, 1950, p. 1 (Ex. VIII-A-19); N. Y. Herald Tribune, Aug. 10, 1950, pp. 1, 6 (Ex. VIII-B-4); N. Y. Daily Mirror, Aug. 10, 1950, p. 4 (Ex. VIII-D-7); N. Y. Journal American, Aug. 8, 1950, p. 1 (Ex. VIII-E-2); N. Y. Post Aug. 2, 1950, p. 16 (Ex. VIII-C-1).

[fol. 71] Concomitantly with the engendered public concentration on atomic spies and spying was press and official propaganda that was designed and served to convert the public mind from considering Communists as an unpopular political minority, into a conviction that their ideological adherence to communism would lead them to commit espionage, sabotage and engage in treasonable activities for and on behalf of the Soviet Union. Some characteristic comments on this subject are found in the statements of J. Edgar Hoover: "that the danger from native Communists and fellow travelers lies 'in the fact that they represent recruiting grounds for espionage information and agents' ", N. Y. Daily Mirror, March 3, 1950 p. 28 (Ex. III-D-); of Representative Carl E. Mundt, ex-Senator of South Dakota, that: "The reason we have the sabotage danger is that we have so many Communists in this country . . . They are after the hydrogen bomb secrets just as actively as they tried for and succeeded in getting the A bomb know-how . . ." N. Y. Daily Mirror, Feb. 12, 1950 p. 2 (Ex. II-D-17); see *e.g.* United News & World Report, Feb. 17, 1950 (Ex. II-H); N. Y. Times, June 9, 1950, p. 1 (Ex. VI-A-4); N. Y. Herald Tribune, June 9, 1950, p. 1 (Ex. VI-B-3); N. Y. Daily Mirror, June 9, 1950, p. 10 (Ex. VI-D-1);

N. Y. Times, July 25, 1950, p. 1 (Ex. VIII-A-9); ibid, July 28, 1950, p. 8 (Ex. VII-A-12); N. Y. Herald Tribune, July 25, 1950 (Ex. VII-B-4); ibid, July 29, 1950 p. 1 (Ex. VII-B-6); N. Y. Times, Aug. 25, 1950, p. 5 (Ex. VIII-A-26); ibid, Aug. 19, 1950, pp. 1, 6 (Ex. VIII-A-19); N. Y. Daily Mirror, Aug. 7, 1950, editorial page (Ex. VIII-D-5); ibid, Aug. 9, 1950, p. 2 (Ex. VIII-D-6); ibid, Aug. 10, 1950, p. 4 (Ex. VIII-D-7); N. Y. Journal American, Aug. 8, 1950, p. 18 (Ex. VIII-E-4); N. Y. Post, Oct. 13, 1950, p. 49 (Ex. X-G-[fol. 72]); N. Y. Herald Tribune, Nov. 29, 1950, p. 9 (Ex. XI-B-9) 1 N. Y. Journal American, Nov. 14, 1950, p. 27, (Ex. XI-E-3); ibid, Nov. 17, 1950, pp. 3, 7 (Ex. XI-E-7, 8, 9); N. Y. Herald Tribune, Dec. 1, 1950, p. 1 (Ex. XII-B-1); ibid, Dec. 3, 1950, p. 1 (Ex. XII-B-2); ibid, Dec. 4, 1950 p. 1 (Ex. XII-B-3); ibid, Dec. 5, 1950, p. 1 (Ex. XII-B-4); ibid, Dec. 6, 1950, p. 1 (Ex. XII-B-5); ibid, Dec. 7, 1950, p. 1 (Ex. XII-B6); ibid, Dec. 11, 1950, p. 1 (Ex. XII-B-9); N. Y. Daily Mirror, Jan. 9, 1951 (Ex. XIII-D-); N. Y. Journal American, Jan. 9, 1951, Editorial page (Ex. XIII-E-2); N. Y. World Telegram and Sun, Jan. 29, 1951, p. 13 (Ex. XIII-F-5); N. Y. Times Magazine Section, Nov. 6, 1950, p. 12 (Ex. XI-H-);

The motive of Communist ideology was attributed to every atomic bomb espionage suspect, whether or not he was thereafter convicted of espionage or another crime, or even where no arrest, indictments or conviction followed the suspicion or out of court accusations. The precedent was set with Fuchs (see documentation *supra*). When it came to Gold, his motivation was represented to be his desire to "aid a country whose aims he liked". N. Y. Times, May 24, 1950, pp. 1, 21 (Ex. V-A-5); ibid, May 28, 1950, p. E-1 (Rev. of Wk.) (Ex. V-A-7); N. Y. Herald Tribune, May 24, 1950, pp. 1, 15 (Ex. V-B-4); N. Y. Daily News, May 24, 1950, pp. 1, 3, 50 (Ex. V-C-3, 4, 5); ibid, May 25, 1950, pp. 2, 50 (Ex. V-C-6); N. Y. Daily Mirror, May 24, 1950, pp. 1, 3, 30 (Ex. V-D-7); N. Y. Journal American, May 24, 1950, pp. 1, 16, 18, 19, 26 (Ex. V-E-1, 4); ibid, May 25, 1950, pp. 1, 15 (Ex. V-E-6); N. Y. World Telegram and Sun, May 24, 1950, p. 1 (Ex. V-F-6); ibid, May 25, 1950, p. 4 (Ex. V-F-8); N. Y. Post, May 24, 1950, pp. 1, 54, 58 (Ex. V-G-1); ibid, May 25, 1950, p. 2 (Ex. V-G-2); N. Y.

Journal American, Nov. 21, 1950 p. 4 (Ex. XI-E-12); N. Y. [fol. 73] Times Dec. 10, 1950, pp. 1, 19 (Ex. XII-A-1); N. Y. Herald Tribune, Dec. 10, 1950, p. 1, (Ex. XII-B-8); N. Y. Daily News, Dec. 10, 1950, p. 2 (Ex. XII-C-); N. Y. Daily Mirror, Dec. 10, 1950, p. 4 (Ex. XII-D); N. Y. Journal American, Dec. 10, 1950, p. 1 (Ex. XII-E-5); N. Y. World Telegram and Sun, Dec. 9, 1950, p. 1 (Ex. XII-F-2); N. Y. Post, Dec. 7, 1950, p. 5 (Ex. XII-G-1).

Greenglasses' arrest was greeted by the announcement of the FBI and the U. S. Attorney for this District that he had been a member of the Young Communist League, and that he explained his actions by saying: "I felt it was gross negilgence on the part of the United States not to give Russia the information about the atom-bomb because she was an ally." It is interesting that his trial testimony did not include this reason. N. Y. Times, June 17, 1950, p. 1 (Ex. VI-A-13); N. Y. Herald Tribune, June 17, 1950, pp. 1, 6 (Ex. VI-B-7); N. Y. Daily News, June 17, 1950, pp. 1, 3 (Ex. VI-C-4); N. Y. Daily Mirror, June 17, 1950, p. 1, (Ex. VI-D-4); N. Y. Journal American, June 16, 1950, p. 1 (Ex. VI-E-4, 5); N. Y. Post, June 18, 1950, p. 1 (Ex. VI-G-3).

The newspapers reiterated this theme throughout the Greenglass proceedings. N. Y. Times, June 24, 1950, p. 2 (Ex. VI-A-15); N. Y. Daily Mirror, June 9, 1950, p. 10, (Ex. VI-D-1); ibid, July 13, 1950, p. 17 (Ex. VII-D-1); ibid, Oct. 19, 1950, p. 5 (Ex. X-D-2); N. Y. Journal American June 23, 1950, p. 4 (Ex. VI-E-9).

One of the highlights of the Brothman-Moskowitz trial was the testimony of Bentley for the prosecution in which she claimed that Brothman and Moskowitz were members of the Communist Party and were introduced to espionage through the apparatus of that organization. N. Y. Times, Nov. 15, 1950, p. 17 (Ex. XI-A-1); ibid, Nov. 22, 1950, p. 5 (Ex. XI-A-5); N. Y. Daily News, Nov. 15, 1950, p. 2 (Ex. XI-C-3); N. Y. Journal American, Nov. 15, 1950, p. 1 (Ex. [fol. 74] XI-E-4); N. Y. World Telegram and Sun, Nov. 15, 1950, p. 3 (Ex. XI-F-1); N. Y. Post, Nov. 15, 1950, p. 5 (Ex. XI-G-3).

To poison the public more thoroughly, the official releases and press, pandered to the basest bigotry, by adverting, in each instance, to national extraction of the accused. For

instance, on Gold's arrest, the F.B.I. announcement described him as "born in Switzerland of parents who were both natives of Russia . . ." with a family name of Goldnitzky. N. Y. Times, May 24, 1950, p. 1, 21 (Ex. V-A-5). Similarly, on the Greenglass arrest, they took pains to point out irrelevantly that Greenglass' father was Russian born and his mother Polish born, N. Y. Times, June 17, 1950, p. 1 (Ex. VI-A-13). Ethel Rosenberg, one of the petitioners, is the sister of Greenglass, and the intended stigma carried over.

As an ominous backdrop, there loomed a picture of the mass extermination of the population by imminent atomic attack. No situation ever existed in history to so arouse the instincts of self-preservation and to provoke public alarm. The fact of this mass fear was enmeshed with the prosecution of those accused of having been instrumental, via espionage, in allegedly aiding the Soviet Union to develop the atomic bomb. The inevitable result could only be to direct against them intense and violent hostility.

The highest authorities, governmental, military and scientific, made dramatic statements to implant in the public mind that New York City and the nation was in grave danger of an atomic bomb attack. For instance, the N. Y. Daily News on July 11, 1950, pp. 3, 28 scare headlined:

"Russia Can A-Bomb Us Now"

[fol. 75] The story following recounted: "This frightening evaluation of the danger hovering over the United States is no whiff of opium smoke. It is a sombre and grim estimate reached in the highest eschelons of the Pentagon."

In its issue of Jan. 8, 1951, p. E (Ex. XIII-E-1), the N. Y. Journal American screamed:

"If Soviets Start War Atomic Bomb Attack Expected on NY First."

The N. Y. World Telegram and Sun of Jan. 8, 1951, p. 6 (Ex. XIII-F-3); quoting an unnamed foreign diplomat stated: "In disclosing his government's (unnamed) estimate of the Soviet A bomb stock pile and production rate, the official argued that Russia will be able to start trading atomic blows by the year's end."

The authorities brought home to the public that attack could be accomplished by smuggling the bombs into our city in tramp steamers that would land within our ports and harbors or by aerial bombardment. Indeed, the newspapers headlined that precautionary measures had already been taken to avert the impending catastrophe. Every newspaper carried stories similar to the one in the N. Y. Daily Mirror of July 28, 1950 p. 2 (Ex. VII-D-7) which was captioned:

"Order Red Vessels Halted in Bay to Undergo Search for Explosives."

To compound the panic, the myth of American atomic monopoly was abandoned, and a reverse position advanced: that the Soviet Union had now achieved superiority in atomic development and stock pile. Below is a sampling of the propaganda to which the population of the metropolitan area was subjected:

"When Russians Strike It Will Be With Plenty of A-Bombs on New York and Washington, D. C." N. Y. Daily News, July 1, 1950, p. 3;

[fol. 76] "Don't play down Red's Atom skill, Briton warns", N. Y. Daily Mirror, Aug. 7, 1950, editorial page (Ex. VIII-D-5);

"Russians have made 3 H-bombs and set off one Briton reports", N.Y. World Telegram and Sun, Feb. 6, 1950, p. 11 (Ex. II-F-4);

"Report Russians have 3 A-plants and 60-bomb pile", N.Y. Journal American, Sept. 24, 1950, p. 10 (Ex. IX-E-3);

"Reds now have 6 A-bombs" front page streamer, N.Y. Journal American, June 14, 1950, p. 1 (Ex. VI-E-2).

There was coupled the warning that there was no true defense to an atom bomb attack, e.g.:

"No bomb defense says Bush", N.Y. Times Feb. 10, 1950, p. 1 (Ex. II-A-10, 11);

"Port's security is non-existent", N.Y. Journal American Feb. 12, 1950, pp. 1, 17 (Ex. II-E-20, 26).

Gruesome and lurid stories and pictures were presented to demonstrate the disastrous and devastating effects of an atomic bombing. The population of this city was treated to the following stories:

"Bomb toll in city of 160,000 is seen", N.Y. Times, Sept. 11, 1950, pp. 5, 18 (Ex. IX-A-2, 3);

"Tydings says bomb can kill a million," N.Y. Times, Oct. 15, 1950 p. 32 (Ex. X-A-1);

"Big hell bomb can slay all—A-men" "The hell bomb can cover the world in lethal dust which could remain radio active for as long as 5,000 years and wipe all human life off the face of the earth", N.Y. Daily News, Feb. 7, 1950, p. 9;

"Warns H-blitz could kill 15,000,000 in day" N.Y. Daily Mirror, Feb. 12, 1950 p. 2 (Ex. II-D-17);

[fol. 77] Within 10 seconds after it is dropped on N. Y. or any other city an atom bomb would kill almost every living thing within a half mile radius of the blast and spread horrible destruction for miles more", General Clay, N.Y. Daily Mirror, Aug. 10, 1950, p. 4 (Ex. VIII-D-7);

"Warn H-bomb blitz could destroy all N.Y.", N.Y. Journal American, Feb. 5, 1950, p. 15 (Ex. II-E-8);

"If the Hydrogen bomb is developed to its maximum efficiency, there will be no place to hide." N.Y. Journal American, Feb. 8, 1950, p. 1 (Ex. II-E-12);

"Heat 3,000 times that of sun could burn all in vicinity", N.Y. Journal American, Feb. 28, 1950, p. 1 (Ex. II-E-45);

"H blast radiation could make a desert of N.Y." N.Y. Journal American, March 1, 1950, p. 6 (Ex. III-E-2);

"Nobody will have to run if H bombs start detonating. A big black cloud full of radio active particles will get you even if . . . you happen to be browsing around the bottom of an abandoned lead mine", Considine, N.Y. Journal American, Jan. 9, 1951, (Ex. XIII-E-4).

Not only were the horrors of death and injury from blast, radiation, and fire depicted, but the people were told, as

well, that even their unborn off-spring might be irreparably affected. Never before was such a terrifying spectacle displayed for public consumption; the exhibits themselves offer the most eloquent testimony of the terrible impact that was produced upon residents in this area. To impress the public with the urgency and dangers of the situation improvised plans for civilian defense were established, on the spur of the moment, and the public was urged to mobilize for immediate action. Terror was struck in the hearts of every parent by the dog-tagging of their children and air-raid drills in the schools. Bomb shelters areas were demarcated in the city's buildings. Residents were enjoined to convert their cellars into bomb shelters, and sky-watchers took posts on the roofs as part of a network of enemy aircraft detection.

[fol. 78] The fear begot the hysteria and the necessarily unbalanced emotionalism created a phobia which precluded any rational treatment of those who might be considered to have been responsible for bring- about *about* this threat of individual and mass annihilation. N.Y. Times, Feb. 9, 1950, pp. 1, 2 (Ex. II-A-9); ibid, Feb. 10, 1950, p. 1 (Ex. II-A-10); ibid, Feb. 10, 1950, p. 1 (Ex. II-A-10, 11); ibid Feb. 12, 1950, p. 1 (Ex. II-A-12); ibid, Feb. 12, 1950 p. 2E (Rev. of Wk.) (Ex. II-A-13, 14, 15); ibid, Feb. 19, 1950, p. 39 (Ex. II-A-16); ibid, Feb. 28, 1950, p. 1, (Ex. II-A-17); ibid, Mar. 3, 1950, p. 9, (Ex. III-A-3); ibid, Mar. 6, 1950, p. 15 (Ex. III-A-4); ibid, Mar. 14, 1950, p. 2 (Ex. III-A-8); ibid, April 1, 1950, p. 1 (Ex. IV-A-1); ibid, May 1, 1950, p. 3 (Ex. V-A-1); ibid, May 5, 1950, p. 4 (Ex. V-A-2); ibid, June 4, 1950, p. 1 (Ex. VI-A-2); ibid, June 6, 1950, p. 5 (Ex. VI-A-3); ibid, June 13, 1950, p. 29 (Ex. VI-A-7); ibid, June 14, 1950, p. 12 (Ex. VI-A-12); ibid, June 14, 1950, p. 33, (Ex. VI-A-9); ibid, June 15, 1950, p. 1, Ex. VI-A-10); ibid, June 16, 1950, p. 5 (Ex. VI-A-11); ibid, July 8, 1950, p. 1, (Ex. VII-A-2); ibid July 20, 1950, pp. 9, 18 (Ex. VII-A, 5, 6); ibid, July 27, 1950, pp. 11, 14 (Ex. VII-A-10, 11); ibid, July 28, 1950 pp. 1, 8 (Ex. VII-A-12); ibid, Aug. 5, 1950, p. 24 (Ex. VIII-A-3); ibid, Aug. 6, 1950, p. 1 (Ex. VIII-A-4); ibid, Aug. 8, 1950, p. 1 (Ex. VIII-A-6); ibid, Aug. 9, 1950, p. 1 (Ex. VIII-A-7); ibid, Aug. 10, 1950 pp. 1, 7 (Ex. VIII-A-9, 10); ibid, Aug. 12, 1950, pp. 1, 4, 30 (Ex. VIII-A-11, 12); ibid, Aug. 13, 1950, p. 1 (Ex. VIII-A-13);

ibid, Aug. 13, 1950 p. 14 (Ex. VIII-A-13); ibid, Aug. 14, 1950, p. 8 (Ex. VIII-A-14); ibid, Aug. 15, 1950, p. 20 (Ex. VIII-A-15); ibid, Aug. 16, 1950, p. 12 (Ex. VIII-A-16); ibid, Aug. 16, 1950, p. 12, (Ex. VIII-A-16); ibid, Aug. 17, 1950, p. 11 (Ex. VIII-A-17); ibid, Aug. 17, 1950, p. 16 (Ex. VIII-A-17); ibid, Aug. 18, 1950, p. 11 (Ex. VIII-A-18); ibid, [fol. 79] Aug. 19, 1950 p. 8 (Ex. VIII-A-19); ibid, Aug. 20, 1950, p. 23 (Ex. VIII-A-20); ibid, Aug. 21, 1950, p. 13, (Ex. VIII-A-21); ibid, Aug. 22, 1950, p. 20 (Ex. VIII-A-22); ibid, Aug. 23, 1950, p. 23 (Ex. VIII-A-24); ibid, Aug. 27, 1950, p. 1 (Ex. VIII-A-27); ibid, Aug. 28, 1950, p. 1, 2nd section (Ex. VIII-A-28); ibid, Aug. 29, 1950, p. 29 (Ex. VIII-A-29); ibid, Aug. 30, 1950, p. 10 (Ex. VIII-A-30); ibid, Aug. 31, 1950 p. 1 (Ex. VIII-A-31); ibid, Aug. 31, 1950, p. 4 (Ex. VIII-A-31); ibid, Sept. 1, 1950, p. 4 (IX-A-1); ibid, Sept. 9, 1950, p. 8 (Ex. IX-A-2); ibid, Sept. 11, 1950, pp. 5, 18 (Ex. IX-A-3, 4); ibid, Sept. 12, 1950, p. 29 (Ex. IX-A-5); ibid, Sept. 13, 1950, p. 8 (Ex. IX-A-6); ibid, Sept. 18, 1950, p. 10 (Ex. IX-A-7); ibid, Sept. 18, 1950, p. 25 (Ex. IX-A-8); ibid, Sept. 19, 1950, p. 1 (Ex. IX-A-9); ibid, Sept. 20, 1950, p. 64 (Ex. IX-A-10); ibid, Sept. 21, 1950, p. 8 (Ex. IX-A-12); ibid, Sept. 24, 1950 p. 57 (Ex. IX-A-14); ibid, Sept. 25, 1950, p. 25 (Ex. IX-A-15); ibid, Sept. 28, 1950, p. 18 (Ex. IX-A-16); ibid, Oct. 2, 1950, p. 9 (Ex. X-A-2); ibid, Oct. 6, 1950, p. 16 (Ex. X-A-3); ibid, Oct. 15, 1950, p. 32 (Ex. X-A-4); ibid, Oct. 19, 1950, pp. 16, 18, (Ex. X-A-5); ibid, Oct. 25, 1950, p. 24 (Ex. X-A-7); ibid Oct. 26, 1950, p. 21 (Ex. X-A-8); ibid, Oct. 29, 1950, p. 33, (Ex. X-A-9); ibid, Oct. 31, 1950, p. 8 (Ex. X-A-10); ibid, Jan. 1, 1951, p. 6 (Ex. XIII-A); ibid, Jan. 2, 1951, p. 1, (Ex. XIII-A-); ibid, Jan. 3, 1951, pp. 1, 16, 17, 18 (Ex. XIII-A) [fol. 80] ibid, Jan. 4, 1951, p. 7 (Ex. XIII-A); ibid, Jan. 5, 1951, p. 9 (Ex. XIII-A-); ibid, Jan. 6, 1951, p. 7 (Ex. XIII-A); ibid, Jan. 7, 1951, pp. 15, 32 (Ex. XIII-A-); ibid, Jan. 8, 1951, pp. 8, 10 (Ex. XIII-A); ibid, Jan. 11, 1951, p. 7 (Ex. XIII-A-); ibid, Jan. 12, 1951, p. 1 (Ex. XIII-A-); ibid, Jan. 13, 1951, p. 7 (Ex. XIII-A-); ibid, Jan. 14, 1951, pp. 1, 31 (Ex. XIII-A); ibid, Jan. 15, 1951, p. 5 (Ex. XIII-A-); ibid, Jan. 16, 1951, p. 12 (Ex. XIII-A-); ibid, Jan. 17, 1951, p. 11 (Ex. XIII-A-); ibid, Jan. 18, 1951, pp. 20, 21 (Ex. XIII-A-); ibid, Jan. 20, 1951, p. 8 (Ex. XIII-A-); ibid, Jan. 21, 1951, pp. 14, 33, 36 (Ex.

XIII-A); ibid, Jan. 22, 1951, p. 1 (Ex. XIII-A-); ibid, Jan. 26, 1951, pp. 11, 14 (Ex. XIII-A); ibid, Jan. 28, 1951, pp. 1, 17 (Ex. XIII-A); ibid, Jan. 29, 1951 (Ex. XIII-A); ibid, Jan. 30, 1951, p. 17 (Ex. XIII-A-); ibid, Feb. 3, 1951, p. 1 (Ex. XV-A); ibid, Feb. 2, 1951, p. 1 (Ex. XIV-A); ibid, Feb. 5, 1951, p. 3 (Ex. XIV-A-); ibid Feb. 6, 1951, p. 3 (Ex. XIV-A); ibid, Feb. 7, 1951, p. 1 (Ex. XIV-A-); ibid, Feb. 9, 1951, p. 7 (Ex. XIV-A); ibid, Feb. 10, 1951, p. 1 (Ex. XIV-A-); ibid, Feb. 11, 1951, p. 1 (Ex. XIV-A); ibid, Feb. 12, 1951, p. 9 (Ex. XIV-A); ibid, Feb. 14, 1951, p. 7 (Ex. XIV-A); ibid, Feb. 18, 1951, p. 43 (Ex. XIV-A); ibid, Feb. 20, 1951, p. 14 (Ex. XIV-A); ibid, Feb. 22, 1951, p. 5 (Ex. XIV-A); ibid, Feb. 23, 1951, p. 1 (Ex. XIV-A-); ibid, Feb. 24, 1951, p. 9 (Ex. XIV-A); ibid, Feb. 25, 1951, pp. 36, 37 (Ex. XIV-A); ibid, Mar. 3, 1951, p. 5 (Ex. XV-A); ibid, Mar. 4, 1951, p. 30 (Ex. XV-A); ibid, Mar. 5, 1951, p. 1 (Ex. XV-A); ibid, Mar. 6, 1951, p. 11 (Ex. XV-A-); ibid, Mar. 10, 1951, pp. 1, 5 (Ex. XV-A-5); ibid, Mar. 13, 1951, p. 1, 15 (Ex. XV-A-7); ibid, Mar. 15, 1951, p. 1 (Ex. XV-A-9); ibid, Mar. 18, 1951, p. 13 (Ex. XV-A); ibid, Mar. 19, 1951, p. 13 (Ex. XV-A); ibid, Mar. 21, 1951, p. 14 (Ex. XV-A-13); ibid, Mar. 24, 1951, p. 26 (Ex. XV-A); ibid, Mar. 28, 1951, p. 18 (Ex. XV-A-16); N.Y. Herald Tri-
[fol. 81] bune, Feb. 5, 1950, pp. 1, 21, 22 (Ex. II-B-a); ibid, Feb. 9, 1950, p. 1 (Ex. II-B-6); ibid, Feb. 10, 1950, p. 7 (Ex. II-B-7); ibid, Feb. 11, 1950, pp. 1, 4, 5 (Ex. II-B-8, 9); ibid, Feb. 12, 1950, sec. 2 pp. 1, 3 (Ex. II-B-10); ibid, Feb. 28, 1950, p. 1 (Ex. II-B-11); ibid, Feb. 22, 1951, p. 6 (Ex. XIV-B-1); ibid, Feb. 25, 1951, p. 2 (Ex. XIV-B-a); ibid, Mar. 12, 1951, (Ex. XV-B-5); ibid, Mar. 19, 1951, p. 6 (Ex. XV-B-13); ibid, Aug. 13, 1950, secs. 2, 4 p. 3 (Ex. VIII-B-1); N.Y. Journal American, Feb. 4, 1950, p. 2 (Ex. II-E); ibid, Feb. 5, 1950, p. 15, (Ex. II-E); ibid, Feb. 8, 1950, p. 1 (Ex. II-E); ibid, Feb. 17, 1950, p. 9 (Ex. II-E-35); ibid, Feb. 20, 1950, p. 6, 16 (Ex. II-E-40, 41); ibid, Feb. 20, 1950, pp. 6, 16 (Ex. II-E-40-41) ibid, Feb. 27, 1950, pp. 1, 7 (Ex. II-E-43, 44); ibid, Feb. 28, 1950, pp. 1, 7 (Ex. II-E-45, 46); ibid, Feb. 12, 1950, p. 1 (Ex. II-E-); ibid, Feb. 12, 1950, p. (Ex. II-E); ibid, Mar. 1, 1950, pp. 1, 6 (Ex. III-E-1, 2); ibid, Mar. 3, 1950, p. 12 (Ex. III-E-4); ibid, Mar. 5, 1950, p. 1 (Ex. III-E-5); ibid, June 14, 1950,

p. 1 (Ex. VI-E-2); ibid, Sept. 10, 1950, p. 1 (Ex. IX-E-); ibid, Sept. 24, 1950, p. 10 (Ex. IX-E-3); ibid, Sept. 25, 1950, p. 6 (Ex. IX-E-4); ibid, Nov. 30, 1950, p. 1 (Ex. XI-E-17, 18); ibid, Dec. 6, 1950, p. 34 (Ex. XII-E-3); ibid, Jan. 8, 1951, p. B (Ex. XIII-E-1); ibid, Jan. 9, 1951, p. 18 (Ex. XIII-E-2); N. Y. Daily News, Feb. 5, 1950, p. 2, 4, 28, (Ex. II-C-2, 3); ibid, Feb. 7, 1950, p. 2, 4 (Ex. II-C-4); ibid, Feb. 27, 1950, p. 25 (Ex. II-C-9); ibid, Sept. 1, 1950, p. 3, 34, (Ex. IX-C-1); ibid, Sept. 11, 1950, p. 3, 28 (Ex. IX-C-2); ibid, Sept. 13, 1950, p. 6 (Ex. IX-C-3); N. Y. Daily Mirror, Feb. 1, 1950, p. 1 (Ex. II-D-1); ibid, Feb. 2, 1950, p. 1 (Ex. II-D-2); ibid, Feb. 5, 1950, p. 3, (Ex. II-D-5, 6); ibid, Feb. 12, 1950, p. 2, 20, 28, (Ex. II-D-17, 18, 19); ibid, Feb. 13, 1950, editorial page (Ex. II-D-20); ibid, July 28, 1950, p. 2 (Ex. [fol. 82] VII-D-); ibid, Aug. 6, 1950, p. 5 (Ex. VIII-D-4); ibid, Aug. 7, 1950, p. 2 (Ex. VIII-D-5); ibid, Aug. 7, 1950, editorial page (Ex. VIII-D-); ibid, Aug. 10, 1950, p. 4 (Ex. VIII-D-7); ibid, Aug. 13, 1950, p. 2, 6 (Ex. VIII-D-9); ibid, Sept. 19, 1950, p. 2, (Ex. IX-D-3); ibid, Oct. 13, 1950, editorial page (Ex. X-D-1); ibid, Dec. 28, 1950, p. 22 (Ex. XII-D-); N. Y. World Telegram and Sun, Feb. 6. 1950, p. 1, 11 (Ex. II-F-3, 4); ibid, Feb. 8, 1950, p. 1, 9, 16 (Ex. II-F-8, 9, 10); ibid Feb. 11, 1950, p. 8 (Ex. II-F-11); ibid, Mar. 4, 1950, p. 2, 15, (Ex. III-F-3, 4); ibid, Jan. 4, 1951, p. 8 (Ex. XIII-F-1); ibid, Jan. 8, 1951, p. 6 (Ex. XIII-F-3); ibid, Mar. 22, 1951, p. 3 (Ex. XV-F-12); ibid, Mar. 6, 1950, p. 11, (Ex. III-F-5); ibid, Mar. 11, 1950, p. 17 (Ex. III-F-6); N. Y. Post Feb. 3, 1950, p. 1 (Ex. II-G-2); ibid, Feb. 5, 1950, p. 1 (Ex. II-G-3); ibid, Feb. 6, 1950, p. 4, 25 (Ex. II-G-4); ibid, Feb. 7, 1950 pp. 27, 28 (Ex. II-G-6); ibid, Feb. 8, 1950, p. 29 (Ex. II-G-7); ibid, Feb. 10, 1950, p. 1 (Ex. II-G-9); ibid, Feb. 16, 1950, p. 5 (Ex. II-G-14); ibid, Feb. 27, 1950, p. 3 (Ex. II-G-16); ibid, Mar. 1, 1950, p. 11 (Ex. III-G-1).

Exhibit I indicates the constant volume of publicity, given totally approximately 30,000 column inches of news space, by the metropolitan press, uninterruptedly for a fourteen month period from February, 1950 to the end of March, 1951, to the volatile subjects which bore upon the case of the petitioners—espionage on behalf of the Soviet Union, the expectation that native Communists would act as spies for the Soviet Union, and the effect of the breach of the United States atomic monopoly. The

quality of the press treatment of these subjects can best be characterized as "front page news", banner headlined, [fol. 83] embellished pictorially, and can most effectively be comprehended by an examination of all the exhibits subsumed under Exhibits II to XV. The coverage of radio and television, not specifically documented here, added tremendously to this development of the climate.

The cumulative effect of this reportage, quantitatively and qualitatively, together with the independent coverage of the charges against, and trial of, the petitioners (shown below) inexorably preconditioned the public mind to acceptance of the guilt of the petitioners.

The Rosenberg Case

Fifteenth: The petitioners were charged with and tried for being members of a conspiracy to transmit atomic bomb information to the Soviet Union, with intent to advantage that nation. At the trial the prosecution introduced evidence, accepted by the Court, that the petitioners were members of the Communist Party of the United States and preferred "Russian Socialism" over "American Capitalism," as relevant on the question of motive and intent (R. 1558, 1654-55).

It is evident, therefore, that the three lines of propaganda which had preceded the petitioners' case for a period of fourteen months touched upon the essential elements of the accusation which the jury was called upon to determine.

In addition to this propaganda, further credance was lent to the Government charges against the petitioners by the fact that previous to the petitioners' trial, those whom the Government heralded, indiscriminately, as their con- [fol. 84] federates—Fuchs, Gold, Greenglass and Slack—confessed their guilt, Brothman and Moskowitz, similarly named, had already been convicted at a trial which had featured their alleged espionage connection with Gold and Bentley.

The Government-forced nexus between the petitioners and these others also served to foist upon the petitioners the heinousness assigned to the crimes of these confessed and convicted. The world had already been told by Fuchs' sentencing judge that his crime "is only thinly differentiated from high treason." N. Y. Times, March 2, 1950,

p. 1 (Ex. III-A-1). Gold had confessed his "deep and horrible remorse," N. Y. Journal American, December 9, 1950, p. 1 (Ex. XII-E-4). And District Judge Irving Kaufman's widely reported remarks on the sentence of Brothman and Moskowitz, termed their alleged crime "beyond . . . comprehension that anyone would commit." N. Y. Times, November 29, 1950, p. 25 (Ex. XI-A-7).

The gravity of the crimes of those prior accused, which thus necessarily adhered to the petitioners, was qualitatively heightened by constant reference to them as "traitors" and the continuous iteration, as to the Americans, that their crimes subjected them to the death penalty, e.g.: N. Y. Daily News, October 19, 1950, p. 3 (Ex. X-C-2); N. Y. Daily Mirror, May 25, 1950, p. 1, 3 (Ex. V-D-8); ibid, July 21, 1950, p. 2 (Ex. VII-D-6); ibid, October 19, 1950, p. 5 (Ex. X-D-2); N. Y. Journal American, June 9, 1950, p. 1 (Ex. VI-E-1); ibid, July 20, 1950, p. 1 (Exh. VII-E-5); N. Y. Times, June 17, 1950, p. 1 (Ex. VIA-13); ibid, July 21, 1950, p. 8 (Ex. VII-A-7); N. Y. Daily News, June 7, 1950, p. 1 (Ex. VI-C-4); N. Y. Journal American, October 18, 1950, p. 1 (Ex. X-E-2); ibid, March 7, 1951, p. 6 (Ex. XVE-2); [fol. 85] N. Y. World Telegram and Sun, October 18, 1950, p. 43 (Ex. X-F-3); N. Y. Post, August 17, 1950, p. 4 (Ex. VIII-G-3); ibid, August 20, 1950, p. 23 (Ex. VIII-G-5); ibid, August 23, 1950, p. 56 (Ex. VIII-G-6); ibid, November 24, 1950, p. 48 (Ex. XI-G-8); N. Y. Herald Tribune, June 24, 1950 (Ex. VI-E-10); N. Y. Daily News, June 17, 1950, p. 1 (Ex. VI-C-4); ibid, July 19, 1950, p. 6 (Ex. VII-C-2); N. Y. Journal American, June 21, 1950, p. 31 (Ex. VI-E-8); ibid, June 23, 1950, p. 4 (Ex. VI-E-9); ibid, December 10, 1950, p. 1 (Ex. XII-E-5); N. Y. Post, December 7, 1950, p. 5 (Ex. XII-G-1).

Fuchs, Gold and Greenglass had also acknowledged either their Communist or former Communist affiliations or sympathy for the plight or objectives of the peoples of the Soviet Union. Brothman and Moskowitz, who neither "confessed," nor testified at their trial, were nevertheless subjected to pretrial charges of their Communist affiliations, and these were made matters of proof by the prosecution through the witness Bentley.

N. Y. Times, February 11, 1950, p. 1 (Ex. II-A-12); ibid, February 19, 1950, p. E-7 (Rev. of Wk.) (Ex. II-A-16);

N. Y. Daily News, February 20, 1950, p. 27 (editorial) (Ex. II-C-8); N. Y. Daily Mirror, February 8, 1950 (editorial) (Ex. II-D-12); ibid, February 11, 1950, p. 3 (Ex. II-D-16); N. Y. Journal American, February 10, 1950, p. 1 (Ex. II-E-16, 17); ibid, February 17, 1950, p. 9 (Ex. II-E-35); N. Y. Post, February 13, 1950, p. 22 (Ex. II-G-11); Time Magazine, February 20, 1950, pp. 22-23, (Ex. II-H-); N. Y. Times, March 2, 1950, pp. 1, 14 (Ex. III-A-1); N. Y. Herald Tribune, March 2, 1950, pp. 1, 12 (Ex. III-B-2); N. Y. Daily News, March 9, 1950, p. 14 (Ex. III-C-4); N. Y. World Telegram and Sun, March 1, 1950, pp. 1, 2 (Ex. III-F-1, 2); New York Post, March 1, 1950, pp. 1, 3, 44 (Ex. [fol. 86] III-G-1); N. Y. Herald Tribune, May 5, 1950 (Ex. V-B-1); N. Y. Post, May 25, 1950, p. 1 (Ex. V-G-2); N. Y. Herald Tribune, June 1, 1950, pp. 1, 13, 14 (Ex. VI-B-1); N. Y. Times, July 21, 1950, p. 8 (Ex. VIII-A-7); N. Y. Herald Tribune, July 21, 1950 (Ex. VII-B-3); N. Y. Daily News, July 21, 1950, p. 4 (Ex. VII-C-4); N. Y. Daily Mirror, July 21, 1950, p. 2 (Ex. VII-D-6); N. Y. Journal American, July 20, 1950, p. 1 (Ex. VII-E-5); N. Y. Post, July 20, 1950, p. 2 (Ex. VII-G-3); N. Y. Times, November 19, 1950, p. 16 (Ex. X-A-5); N. Y. Daily News, November 19, 1950, p. 3 (Ex. X-C-2); N. Y. Daily Mirror, November 19, 1950, p. 5 (Ex. X-D-2); N. Y. Journal American, November 18, 1950, p. 1 (Ex. X-E-2); N. Y. World Telegram and Sun, November 18, 1950, p. 43 (Ex. X-F-3); N. Y. Times, December 10, 1950, pp. 1, 19 (Ex. XII-A-1); N. Y. Herald Tribune, December 10, 1950, p. 1 (Ex. XII-B-8); N. Y. Daily News, December 10, 1950, p. 2 (Ex. XII-C-); N. Y. Daily Mirror, December 10, 1950, p. 4 (Ex. XII-D-); N. Y. Journal American, December 9, 1950, p. 1 (Ex. XII-E-4); ibid, December 10, 1950, p. 1 (Ex. XII-E-5); N. Y. World Telegram and Sun, December 9, 1950, p. 1 (Ex. XII-F-2); N. Y. Post, December 7, 1950, p. 5 (Ex. XII-G-1); N. Y. Journal American, January 15, 1951, p. 2 (Ex. XIII-E-3); N. Y. Times, November 23, 1950, p. 1 (Ex. XI-A-6); ibid, November 29, 1950, p. 25 (Ex. XI-A-7); N. Y. Herald Tribune, November 23, 1950, p. 1 (Ex. XI-B-8); ibid, November 29, 1950, p. 1 (Ex. XI-B-9); N. Y. Daily News, November 23, 1950, p. 2 (Ex. XI-C-7); ibid, November 29, 1950, p. 8 (Ex. XI-C-8); N. Y. Daily Mirror, November 23, 1950, p. 2 (Ex. XI-D-8); ibid, November 29, 1950, p. 4 (Ex.

XI-D-9); N. Y. Journal American, November 22, 1950, p. 3 (Ex. XI-E-13); ibid, November 28, 1950, p. 1 (Ex. XI-E-14-16); N. Y. World Telegram and Sun, November 28, 1950, p. 22 (Ex. XI-F-5); N. Y. Post, November 22, 1950, p. 4 (Ex. XI-G-7); ibid, November 24, 1950, p. 48 (Ex. XI-G-8); ibid, [fol. 87] November 28, 1950, p. 3 (Ex. XI-G-3).

The press campaign as it was specifically applied to the petitioners was inspired, almost entirely, by the prosecuting arm of the Government, by material "fed to" the newspapers.

Long before the petitioners were brought to trial in the early part of March, 1951 and commencing with their respective arrests, the Government had already tried their case in the newspapers, through the issuance of *ex parte* announcements on each of the essential issues which later arose in the trial. The initial blow was a joint announcement by Hoover and J. Howard McGrath, then Attorney General. The subsequent releases emanated from Saypol and his assistants.

These announcements transcended the actual charges contained in the indictment, egregiously magnified the seriousness of the alleged crime and conveyed the official conviction of the petitioners' guilt of the crime charged. To give merely two instances:—Though the indictment did not charge the petitioners with "intent to injure" the United States, the prosecutive and investigative agents of the Government made this public pre-trial accusation; though neither Dr. Klaus Fuchs nor Alfred Dean Slack nor Brothman and Moskowitz were named as defendants or co-conspirators in the indictment against the petitioners (and it cannot be contended that these were the "other unknown" "co-conspirators, as stated in the indictment), these officials made this accusation as part of their pre-trial public presentation.

On the date of the arrest of the petitioner, Julius Rosen-[fol. 88] berg, the Hoover statement, published in every metropolitan newspaper, said that Julius Rosenberg was "another important link in the Soviet espionage apparatus that includes Dr. Klaus Fuchs . . . Harry Gold . . . Alfred Dean Slack . . . and David Greenglass . . ." N. Y. Times, July 18, 1950, p. 1 (Ex. VII-A-3). See also: N. Y. Herald Tribune, July, 1950, p. 1 (Ex. VII-B-1); ibid,

July 19, 1950 (Ex. VII-B-2); N. Y. Daily News, July 18, 1950, p. 1 (Ex. VII-C-1); N. Y. Daily Mirror, July 18, 1950, pp. 1, 2 (Ex. VII-D-2-4); N. Y. Journal American, July 18, 1950, p. 1 (Ex. VII-E-3); N. Y. Post, July 18, 1950, p. 2 (Ex. VII-G-1). The N. Y. Daily News for July 18, 1950 stated that "Hoover's announcement of the Rosenbergs' arrest declared that the suspect was part of the ring that included Fuchs, British nuclear physicist and three other Americans, Gold, David Greenglass . . . and Alfred Dean Slack."

His statement was also quoted by the N. Y. Times of July 18, 1950 to the effect: "that the gravity of Rosenberg's offense was accentuated by the fact that he—an American born citizen aggressively sought means to secretly conspire with the Soviet Government to the detriment of his own country."

As reported by the N. Y. Times, among other newspapers, on July 20, 1950, p. 18 (Ex. VII-A-6) "authoritative sources" were quoted as saying that "Rosenberg had contacts with other persons besides his brother-in-law, David Greenglass." Saypol, then a few days later, stated: "Rosenberg is involved in a situation which has intensive ramifications." N. Y. Daily Mirror, August 1, 1950, p. 4 (Ex. VIII-D-1).

On and after the arrest of the co-defendant, Morton Sobell, statements again were attributed to Saypol, and never denied by him, that Sobell was a "close personal friend of Julius Rosenberg;" that Rosenberg "recruited [fol. 89] Sobell as a member of the ring;" and "told Sobell to leave the country." No such evidence was ever produced at the trial. Indeed, it is undisputed that Rosenberg was already in custody before Sobell allegedly fled the country N. Y. Times, August 19, 1950, p. 1 (Ex. VIII-A-19); ibid, August 24, 1950, p. 20 (Ex. VIII-A-25); N. Y. Herald Tribune, August 20, 1950, p. 16 (Ex. VIII-B-9); N. Y. Post, August 18, 1950, p. 2 (Ex. VIII-G-4).

Above all, by means of revealing, in detail, all of the prosecution evidence to be presented in Court, the officials of the United States Government, responsible for the prosecution of the case against the petitioners, induced the public to accept their estimate of the guilt of the petitioners.

The trial itself became a mere formality, to give judicial confirmation to evidence already imbedded in the memory of the jury.

On the day of the arrest of the petitioner, Julius Rosenberg, Mr. Hoover's announcement stated that their investigation revealed, according to the N. Y. Times of July 18, 1950, pp. 1, 8 (Ex. VII-A-3):

> "Mr. Hoover related that Rosenberg recruited Greenglass to make secret technical information available both to Gold and Rosenberg in 1945."
>
> "Mr. Hoover said that Rosenberg gave Greenglass specific information on the type of atomic data the Russians desired."
>
> "According to Mr. Hoover, Rosenberg early in 1945 gave, Greenglass, while the latter was on furlough in New York, one half of an irregularly cut jello box top. The other half of the top was given by Rosenberg to Harry Gold in Albuquerque, N. M. This was done so Gold could identify himself to Greenglass.
>
> "When Gold and Greenglass met in June of 1945 Greenglass was paid $500 by Gold, who got it from his Soviet superior Anatoli A. Yakovlev, vice consul of the Soviet Consulate in New York."
>
> [fol. 90] "Greenglass, Mr. Hoover said, turned over to Gold secret information he had secured from the atomic bomb project at Los Alamos, where Greenglass was stationed as a soldier.
>
> "After Dr. Fuchs and Gold were arrested in February and May, respectively, Greenglass was warned by Rosenberg to leave the country. The F.B.I. said that he instructed Greenglass to obtain a passport to Mexico. He was then told to make his way to Switzerland and report to the Czechoslovakian embassy there.
>
> "However, Greenglass was arrested shortly after he got these instructions from Rosenberg."

Similar accounts of the Hoover statement were reported in all other newspapers for that date cited in the paragraphs immediately prior to this one.

In statements issued to the press at or after the various

proceedings which followed the arrest of the petitioner, Julius Rosenberg, and the subsequent arrest of the petitioner, Ethel Rosenberg, further revelations of evidence were made by the prosecuting attorney, Saypol. On the proceedings for pleading to the indictment against the petitioners, Saypol was quoted as having given the following information:

> "Mr. Saypol said that the Rosenbergs were active in recruiting espionage agents for the Soviet Government. He added that after Gold's arrest, Rosenberg tried to persuade the Greenglasses to flee to Russia. The Rosenbergs were preparing to leave themselves when Rosenberg was arrested."

He added:

> "The conspiracy in the main centered around a plot to obtain secretive and classified data and information concerning the atom bomb project at Los Alamos . . . the objective was to turn over to the agents of the Russian Government the information obtained."

N. Y. Times, August 18, 1950, p. 7 (Ex. VIII-A-18); N. Y. Herald Tribune, August 18, 1950, (Ex. VIII-B-7); N. Y. Daily News, August 18, 1950, p. 23 (Ex. VIII-C-4); N. Y. [fol. 91] Daily Mirror, August 18, 1950, p. 2 (Ex. VIII-D-10); N. Y. Journal American, August 17, 1950, p. 3 (Ex. VIII-E-9).

On the arrest of the co-defendant, Morton Sobell, Saypol announced in New York "that Sobell had many dealings with Rosenberg in the conspiracy to supply Russia with atomic secrets." N. Y. Times, August 19, 1950, p. 1 (Ex. VIII-A-19); N. Y. Herald Tribune, August 19, 1950, p. 1 (Ex. VIII-B-8); ibid, August 20, 1950, p. 16 (Ex. VIII-B-9); N. Y. Daily News, August 19, 1950, p. 2 (Ex. VIII-D-11); N. Y. Journal American, August 19, 1950, p. 1 (Ex. VIII-E-12); N. Y. Post, August 18, 1950, p. 2 (Ex. VIII-G-4); ibid, August 20, 1950, p. 23 (Ex. VIII-G-5).

Likewise, the authorities infected the public attitude by their pre-trial characterizations of the petitioners as Communists and their motivation and intent to be grounded on

ideological considerations. Hoover's public statement was carried in the metropolitan press in the following way:

> The FBI investigation revealed, Mr. Hoover said, that Rosenberg made himself available to Soviet espionage agents so he could do the work he was slated for and so he might do something to help Russia." N. Y. Times, July 18, 1950, p. 1 (Ex. VII-A-3).
>
> ". . . The FBI disclosed that its agents had been trailing Rosenberg for several years. According to the FBI he had worked as an engineering inspector for the Army Signal Corps during the war but was dismissed in 1945 on suspicion that he was a Communist Party member . . . The FBI began to watch him. It became especially suspicious of him when he broke all open connections with the Communist Party in 1948 even cancelling his subscription to the Daily Worker." Ibid, July 23, 1950 (Rev. of Wk.) p. 2E (Ex. VII-A-8).
>
> "The FBI announcement said he (Rosenberg) was removed as associate engineering inspector by the Secretary of War in Feb. 1945 on the recommendation of his Commanding Officer 'on the basis of information indicating Communist Party membership' . . . The FBI Director added that the inquiry to date indicated that Rosenberg made himself available to Soviet [fol. 92] Agents 'so he could ro the work he felt he was slated for' and 'do something to direct help Russia'." N. Y. Herald Tribune, July 18, 1950, p. 1 (Ex. VII-B-1); ibid, July 19, 1950 (Ex. VII-B-2).
>
> "The FBI quoted Rosenberg as saying 'I wanted to do something to directly help Russia'." N. Y. Daily News, July 18, 1950, pp. 1, 24 (Ex. VII-C-1).
>
> "Rosenberg's red affiliation was known as far back as Feb. 9, 1945, Hoover said, when he was discharged as an engineering inspector from the Army Signal Corps on information indicating he was a member of the Communist Party." N. Y. Journal American, July 18, 1950, pp. 1, 8 (Ex. VII-E-3, 4).
>
> "Rosenberg at that time was an associate engineering inspector for the Army Signal Corps. He was fired by the War Secretary in 1945 on information that he

was a card-carrying Communist." N. Y. Post, July 18, 1950, pp. 2, 14 (Ex. VII-G-1).

On the basis of the Government's announcements the press took up the hue and cry against the petitioners, independently embellished the stories, and featured independent commentaries and editorials with respect to Soviet spying. They connected the petitioners with the "Fuchs-Gold" espionage ring, and pounced upon their alleged Communist affiliations and beliefs, and inflated the F. B. I. appraisal of the injury inflicted on our country by reason of the alleged espionage activities of the petitioners. This is apparent in all of the newspaper articles and commentaries to which we have referred above. And as the eve of the trial of the petitioners approached, the press was still permeated with vivid accounts and graphic pictorials of the effects of atomic attack upon the New York City population (*See* e.g.: Exhibits XIII-A to XV-A).

Thus, the prosecuting and investigative officials of the Department of Justice "caused and stimulated . . . massive pre-trial publicity." All of this evidence pointed to the "guilt of the offenses charged in the indictment." Some of the damaging evidence could never have been properly introduced at the trial of the petitioners, because it related [fol. 93] to matters outside the scope of the charge.

This pre-trial publicity was prosecution without defense. In effect, it was not only testimony without cross-examination, but a special public sponsorship by the F. B. I.—weighted by its prestige and reputation for infallibility—of the credibility of the prosecution witnesses. It was a presentation of evidence untempered, unchallenged or minimized by evidence offered by the accused. It was, in short, the kind of circumstances, which the court in the *Delaney* case, stated was conducive to public "preconceptions as to probable guilt," which must vitiate the conviction.

The Perl Indictment

Sixteenth: The unfair tactics of the Government, which preceded the trial, in influencing the community, were climaxed with a coup in the very midst of the trial proceedings, in the form of the indictment of one, William Perl.

The trial of the petitioners commenced on March 6, 1951 and terminated when the jury returned a verdict of guilty on March 29, 1951.

On March 15, 1951, a sensational story broke in the entire metropolitan press of New York City concerning the indictment, returned in the U. S. District Court of the Southern District of New York against Perl, for the crime of perjury.

Four counts were reported to be contained in the indictment. The first count related to false testimony Perl allegedly gave before the Grand Jury with respect to material matter as to his knowledge of the co-defendant Morton Sobell. The second count made similar charges with respect to matter as to his knowledge of Helene Elitcher, wife of Max Elitcher. Mrs. Elitcher had been listed as a proposed Government witness (R. 51-2). Elitcher had already com- [fol. 94] pleted his testimony as a Government witness in the trial, on March 9 (R. 197-388). The third count made similar charges with respect to matter as to his knowledge of the petitioner, Julius Rosenberg. The fourth count made similar charges with respect to matter as to his knowledge of Ann and Michael Sidorovich (wife and husband). This latter couple had likewise been listed on the Government's roll of witnesses (R. 51-2).

The falsity of the testimony was alleged to be Perl's sworn denial of his knowledge of any of these persons on his appearances before the Grand Jury on August 18, 1950 (first three counts) and on September 11, 1950 (fourth count), in the course of its inquiry into "Soviet espionage."

The metropolitan press bannered the Perl indictment. It was the front page story of the day. The New York Times headlined its story: "Columbia Teacher Arrested, Linked to 2 on Trial as Spies." The sub-head read: Physicist called perjurer in denying that he knew Rosenberg or Sobell." (Ex. XV-A-9). The New York Daily News' front page read: "Nab New York Prof in Spy Probe." The story itself appeared on page 2 under the caption "Columbia instructor nabbed by FBI as atom-plot perjurer." (Ex. XV-C-10). The New York Daily Mirror blared: "Columbia Professor Seized by FBI," accompanied by adjoining pictures of William Perl and petitioners in handcuffs. The companion story was headed: "College Scientist arrested

as liar in atom spy case" (Ex. XV-D-7). The New York World Telegram and Sun likewise featured its story with: "Columbia Prof Held in Trial as Spy Link," with the subhead "U. S. says he had been urged to go abroad" (Ex. XV-F-8); the N. Y. Herald Tribune headlined its story: "Columbia Instructor Arrested for Perjury in Atom Spy Case," followed by sub-title "FBI seizes William Perl; 4 count [fol. 95] indictment based on denial he knew Rosenberg, Sobell." Alongside the story was a large picture of Perl. (Ex. XV-B-8). On Page 4 of the N. Y. Post of this day was a full length picture of Perl with the caption "Columbia University Scientist held in $20,000 bail on a perjury charge." (Ex. XV-C-8). The N. Y. Journal American, p. 1, introduced its story: "Columbia Instructor Arrested on Perjury Charge in Atomplot" (Ex. XV-E-10).

The N. Y. Daily News story connected Perl with Gold, one of the prosecution witnesses in the trial against the petitioners and the "spy ring on trial." It continued: "He was charged with denying before the Grand Jury last August and September that he knew Julius Rosenberg . . . and Morton Sobell, now on trial on espionage charges . . . the FBI said he was a classmate of Rosenberg and Sobell at City College . . ." There followed, in the same account, a resume of the testimony that had theretofore been given on the trial of the petitioners.

The N. Y. Daily Mirror story stated, among other things, that "a young Columbia University scientist, described by the U. S. Attorney's Office as one of the nation's top specialists in aero-dynamics and jet propulsion was arrested by the FBI last night on a four-count perjury indictment linking him with the current atomic espionage case . . . Dr. William Perl, 32, of Russian, Polish extraction (sic) was taken into custody . . . Perl was indicted Tuesday by the Federal Grand Jury investigating the atom spy ring, charged with denying acquaintance with his former CCNY schoolmates, Julius Rosenberg, and Morton Sobell, defendants in the espionage case being tried in Federal court here. . . . Perl, in his testimony before the Grand Jury on August 18 and September 11, 1950, also denied knowing [fol. 96] Michael and Ann Sidorovich of Cleveland, Ohio and Max and Helene Elitcher of . . . Flushing. The Sidorovich's, according to trial testimony of former Army

Sergeant David Greenglass and his wife Ruth were supposed to act as couriers between Cleveland and New York, a job subsequently given to Harry Gold, also a defendant . . . Perl, Rosenberg, Sobell, and Elitcher, all attended CCNY . . . In Washington, FBI director J. Edgar Hoover said Perl had been under investigation since shortly after the arrest of Harry Gold in May, 1950. The arrest of Gold, Rosenberg, his wife, Ethel, and Sobell followed the capture of Dr. Klaus Fuchs in England . . . Asked whether Perl is believed to have turned aeronautic secrets over to the spy ring members, U. S. Attorney Saypol commented 'all I can say is that he was indicted in connection with the probe of a Soviet atomic spy ring some of whose members are now on trial.' " There followed a recapitulation of the testimony of Ruth Greenglass which had been given on the trial of the petitioners on March 14, 1951, the day before. It must be recalled that her testimony had not been completed and the record shows that she was in the midst of cross-examination when the news of the indictment become public (R. 756).

The N. Y. World Telegram and Sun story stressed: "William Perl, jet propulsion scientist and physics instructor at Columbia University today pled innocent to a 4 count perjury indictment in connection with current atomic espionage trial." It added he was charged "with having lied when he told a Federal Grand Jury he did not know Julius Rosenberg and Morton Sobell."

The N. Y. Herald Tribune story had this comment: "William Perl, 32, an instructor in physics at Columbia University was arrested here last night by agents of the Fed- [fol. 97] eral Bureau of Investigation on a sealed indictment charging him with perjury in connection with a spy ring transmitting atomic secrets to Russia. . . . Four count indictment accuses him of lying when he denied he knew Julius Rosenberg, Ethel Rosenberg and Morton Sobell, 2 of the 3 in a trial now entering its eighth day at the U. S. courthouse here, in which they were accused of a war-time conspiracy to steal atomic secrets for Russia. . . . Mr. Perl was a classmate of both Rosenberg and Sobell at City College . . . the other two counts accused him of denying that he knew Mr. and Mrs. Michael Sidorovich and Mrs. Helene Elitcher who have already appeared as witnesses

for the government in the current espionage trial. [The record shows that these three people were never called, by the Government to testify.] All four of the alleged perjuries were said to have been committed before the Grand Jury August 18 and September 11." The remainder of this story spilled over into an account of the testimony that had been offered in the trial of these petitioners the day before.

The N. Y. Post story was headlined "Physicist Held as Liar Offers Spy Trial Aid", and sub-headed: "William Perl . . . was held today . . . on a perjury indictment growing out of the atomic spy trial". The story indicated that Perl was about to flee the country and introduces one, Vivian Glassman, who "has been listed by the government as one of the witnesses to be called in the espionage conspiracy trial of Julius Rosenberg, his wife, Ethel, and Morton Sobell . . . Perl is accused . . . of lying . . . by denying that he knew Rosenberg, Sobell and 4 other persons who have been questioned in the espionage case . . . Foley [an assistant U. S. Attorney] asserted: 'Your Honor, Perl has admitted in my presence that he lied to the [fol. 98] Grand Jury' . . . despite his denial that he knew Rosenberg and Sobell on trial for their lives with Mrs. Rosenberg. The FBI said that Perl was his classmate . . .".

The N. Y. Journal American quotes U. S. Attorney Saypol as stating that Perl "was part of the whole atom spy investigation and was given money by Vivian Glassman to flee the country". It recites further that the perjury was based upon Perl's statement to the Grand Jury that he did not know Sobell, the Rosenbergs or the Elitchers. "The D. A. continued to explain that Perl was a college classmate of Sobell, Rosenberg and Ethel." "The dark wavy haired Perl has been urged by the government for the past month to be a prosecution witness in the current spy case . . . It was learned he became more and more obstinate though his name was on the list of prospective Federal witnesses handed over to the defense, and flatly refused to testify." The story refers to the parentage of Perl as a "Russian" father and a "Polish" mother.

Perl's alleged perjury was committed six months before he was indicted. If Asst. U. S. Attorney Foley is to be believed Perl had admitted to the authorities that he had lied.

The inquiry naturally arises as to the reason the Government waited six months before causing an indictment to be returned against Perl and why the indictment was unsealed in the course of the petitioners' trial. There is no indication that Perl told the Government or any agent of the Government anything other than what he told the Grand Jury on his appearances before that body in August and September of the previous year.

The docket in the Perl case (C-135-43) shows that the [fol. 99] indictment against Perl was returned on March 13, 1951 and filed and ordered sealed by Judge Goddard, who was then sitting in the Criminal Part which normally disposes of such matters. Nonetheless, the sealed indictment was not ordered opened until the following day. It was then opened and a bench warrant issued, not by Judge Goddard, but by Judge Irving Kaufman, the presiding judge in the petitioners' trial.

This deviation from normal procedure must be related to the circumstances that David Greenglass, the Government's main witness against the petitioners, had been on the stand testifying for the Government on March 13, and March 14, 1951, the day of, and the day following, the return of the sealed indictment. His examination was concluded on March 14, 1951. Ruth Greenglass also a key prosecution witness had completed her direct testimony and was in the midst of her cross-examination by the close of the court day of March 14. Perl was apprehended the night of March 14 and arraigned March 15.

The timing of the release of the indictment becomes significant when one considers the statement made to the press by prosecuting attorney, Saypol, when Perl's indictment was made public. He said:

> "Mr. Saypol said that Perl had been listed by the Government as a prosecution witness in the current espionage trial. *His special role on the stand, Mr. Saypol added was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses at the trial.*"

Further insight into the timing of the indictment and clarification of Saypol's position are found in the parallel

lines of the statements concerning the perjuries of William Perl issued to the press, and the testimony of David Greenglass on the witness stand at the petitioners' trial.

[fol. 100] Greenglass (and his wife) had testified that Rosenberg stated to them that Ann Sidorovich was an espionage courier (R. 443-50, 686-90). It will be recalled that the press stressed the count in Perl's indictment that he had lied concerning his knowledge of the Sidorovitchs, and coupled this with his alleged perjury with respect to his knowledge of the petitioner Julius Rosenberg.

David Greenglass testified further that Rosenberg had admitted to him that he had espionage contacts in Cleveland where Perl apparently resided and where, concededly, the Sidorovitches lived (R. 516-17). The Government's claim that Perl lied would lend support to this testimony of the Greenglasses.

Moreover, the subject of Perl and the Sidorovitchs became important in the cross examination of Julius Rosenberg when he took the stand in his own defense. Saypol queried him sharply about his knowledge of Perl, which in the face of the indictment that had then been returned on March 15, was prejudicial on its face (R. 1159-60). (Saypol apparently understood this, since, after the formalities, it was the first question he posed on cross.)

But Saypol went further in his cross examination and inquired whether Rosenberg gave Vivian Glassman $2,000 to give to an alleged confederate in Cleveland (R. 1193-1198). It will be remembered that the newspaper accounts stated that the purpose of the alleged Vivian Glassman trip was to give money to Perl. This was, per se, a poisonous injection into the trial which could only prejudice the petitioners in the minds of the jury.

That this coup of the prosecution in causing the indictment of Perl, when it did, cannot be sloughed off as a routine [fol. 101] criminal proceeding was made apparent only by events which occurred—and became known to the petitioners—subsequent to the termination of their trial.

The docket in the Perl Case records that Perl has not yet been brought to trial although he has been pressing for a speedy trial. At the time of Perl's arraignment, on March 15, 1951, John M. Foley, Assistant U. S. Attorney,

also a counsel of record for the Government in the trial of the petitioners, stated to the Court:

> "The Government is ready to proceed on April 2nd. However, counsel for the defendant has advised me that he is going to be engaged through the 8th of April and he would not be ready for trial until the 16th or 17th of April. The Government has no objection to the date defense counsel suggests."

The Government, however, has avoided a trial. According to Perl's uncontradicted statements in affidavits submitted in support of motions to compel a speedy trial, the Government refused to proceed on a trial date set for June 18, 1951, and, again on October 4, 1951, to which date the trial had been adjourned, when the case was marked off the calendar.

The U. S. Attorney's office, as noted above, had declared, at the arraignment of Perl which occurred during the pendency of the petitioners' trial, that it was "ready to proceed on April 2," (1951), but has since objected to going to trial even a year later—in June 1952.

In an affidavit submitted on May 26, 1951, by Robert Martin, Assistant U. S. Attorney, we find the following language:

> "The reason that the case has not been brought to trial to date is because, among other reasons, which may not properly be declared at this time, the U. S. attorney believes it desirable to have all aspects of the Rosenberg and Sobell prosecution completed before commencing prosecution in the related cases."

[fol. 102] He further stated in a supplementary affidavit on June 1, 1952:

> "The offense charged in the indictment of this case is one of the most serious import. The defendant is a physicist and a leading specialist in aero-dynamics. He has done work in fields of top military secrecy. He is charged with perjury in that he denied knowing, before a Grand Jury investigating espionage, persons who have subsequently been convicted of engaging in espionage on behalf of the Soviet Union.

> The prosecution in the espionage case, that against Julius Rosenberg has not been completed and is presently awaiting possible application for review by the Supreme Court. The U. S. has deemed it unwise to proceed further and reveal proof in this perjury case until the Rosenberg case and related matters have been concluded."

This constituted a surprising change in the Government's attitude, for on March 30, 1950, in arguing against the motion for a Bill of Particulars, the U. S. Attorney Foley had stated:

> "If this were an unusually difficult case, if it was a complicated factual situation, if it required great pains in preparing for trial, then I could understand the defense counsel predicament. I would not agree with their contention, however. But this is such a simple case, your Honor, I do not see why any unusual allowance should be made in a Bill of Particulars."

The only reasonable conclusions that can be drawn from this concatenation of events are either: (1) the Goverment acted in bad faith in causing an indictment to be returned against Perl and timed its release to prejudice the petitioners before the jury at their trial, or (2) that the evidence that might have been elicited on Perl's trial would have tended to exculpate the petitioners in their case.

The Court has before it the question as to whether or not these actions in the Perl indictment represents a fraud upon the Court. But whether or not there was *mala fides*, there was imposition on the administration of justice, by the timing of the Perl indictment, under the circumstances [fol. 103] above described. Its effect was highly prejudical and could only have further inflamed the jury against the petitioners, and deprived them of that fair trial guaranteed to them under the Fifth and Sixth Amendments to the Constitution of the United States.

II

Seventeenth: The case against the petitioners was built upon perjured testimony. The prosecution, as will be

pointed out below, must have known that the testimony was false.

The incidents recited below, singly and together, give indication that the entire prosecution was tainted with fraud. In combination with the extra-judicial tactics of the Government to prejudice the petitioners in a trial by newspaper, and the matter discussed in Point III, it is made readily apparent that the petitioners—who stand to forfeit their lives—were the subjects of a monstrous miscarriage of justice.

The Greenglass "Confession"

Eighteenth: David Greenglass was apprehended in the early afternoon of June 15, 1950 (R. 567).

He testified that, in the evening of June 15 and the early hours of June 16, he revealed to the authorities truthful information concerning his illegal activities at Los Alamos and elsewhere.

During questioning by the Court, Greenglass testified as follows:

> "Q. Well, did you conscientiously withold any facts that night?
>
> A. No, I did not conscientiously withold those facts.
>
> Q. And did you conscientiously tell substantially what you have told in court these past few days?
>
> A. That I did, and in other statements, because I couldn't remember at once.
>
> Q. Well, when you left that evening, was there any understanding that you would make a subsequent statement?
>
> A. I suppose there was.
>
> [fol. 104] Q. I don't want to know whether you suppose.
>
> A. Yes, there was an understanding to that effect. I said to them 'that is to the best of my knowledge at this time'." (R. 577-78).

Immediately, after his apprehension, Greenglass arranged to retain the firm of O. John Rogge, Esq., as his attorneys (R. 596), and the following day paid Rogge a retainer of $4,000 to represent him (R. 732, 794). Green-

glass was allowed to testify further, under cross-examination as follows:

> "Q. Didn't you tell your lawyer to fight this case for you?
> A. I did not." (R. 596).

Greenglass' answers to the above questions were false and perjurious and known to be such by the prosecution.

It was only during the proceedings on Greenglass' sentence, which took place after the case against the petitioners had been fully closed and sentence against them had been pronounced, that this testimony was belied.

At that time, Saypol, the United States Attorney, in active and chief charge of the prosecution, addressed the court as follows:

> "When David Greenglass was arrested after the first indictment in the State of New Mexico, I remember well how at his arraignment before the Commissioner in this District Mr. Rogge protested his innocence. Through Ruth Greenglass, his wife, came the subsequent recantation of those protestations, their representation and the disclosure of the facts by both of them. . . " (R. 1623).

The facts comport with Saypol's comments. It is significant, however, that nowhere during the trial did Saypol make any attempts to correct the falsity.

Greenglass was the key Government witness against the petitioners. A sharp issue was presented to the jury. Its determination was necessarily based upon an evaluation of the credibility of the testimony of Greenglass as against [fol. 105] the credibility of the testimony of the petitioners, which testimony was in direct conflict on the basic issues of the case. Not only would his failure to "confess" immediately have *per se* impugned Greenglass' credibility, but it would have enabled the defense to inspect the first statements that Greenglass allegedly gave to the authorities on his apprehension, that may have further exposed this witness.

On the afternoon of June 16, Greenglass was arraigned and Mr. Rogge, appearing as his counsel, demanded low

bail. (R. 596). The United States Attorney opposed the application and Greenglass was then lodged in the West Street Detention House and placed in solitary confinement (R. 596-97).

In the meantime and on the morning of June 16, the petitioner Julius Rosenberg was requested by the F. B. I. representatives to be interviewed at the Federal Building (R. 1137). Upon compliance with the request, this petitioner was questioned for a number of hours, but was not detained (R. 1137-41). He left the building, unmolested and unrestrained (R. 1141).

On June 18, two days later, Greenglass' wife, Ruth Greenglass, the second most important Government witness, consulted with Rogge (R. 732). About a day later, Greenglass was removed from his confined quarters and restored to the usual privileges of prisoners (R. 598-99).

Mrs. Greenglass continued in regular consultation with Rogge (R. 779-80). In the middle of July, she "willingly" accompanied this lawyer to attend a pre-arranged conference at the office of the United States Attorney, Greenglass being brought in to attend (R. 742-43). There were present at this conference Saypol, his chief assistant, Lane, and agents of the F. B. I. It is interesting to note that in contrast to other witnesses, Mrs. Greenglass' first inter-[fol. 106] view took place in the office of the United States Attorney rather than in the office of the F. B. I. (R. 742). Both David and Ruth Greenglass were vague about the subjects of discussion at this meeting (R. 601-2, 743), but in the wake of the conference three events ensued. Mrs. Greenglass, with her lawyer, returned the next day to talk with F. B. I. agents and the day following signed a prepared statement (R. 743). The petitioner Julius Rosenberg was arrested with a few days thereafter. Greenglass was transferred from the Federal House of Detention at West Street to the Tombs (R. 598-99). From that time Greenglass became a frequent visitor at the Federal Building and signed "six" or "seven" statements and, in addition made many unwritten statements (R. 604). Mrs. Greenglass remained and continues to remain a free woman (R. 740).

When Rogge, on Greenglass' sentence, made his plea for leniency, he declared:

> ". . . now with this background what I do want to emphasize is that David did cooperate with the Government and *almost* from the outset." (R. 1628)

He further stated that he represented at least six people who were active for the prosecution in this case—the Greenglasses, Max Elitcher (the first witness against the petitioners at the trial) and Elitcher's wife (who was named on the Government's list of witnesses but not called), Louis Abel and Dorothy Abel, his wife (who were Government witnesses), and Helen Pagano (Mr. Rogge's secretary, who was likewise a Government witness) (R. 1629).

Upon information and belief, Greenglass told Rogge, immediately after his apprehension and on a number of occasions thereafter, that he desired to defend himself against the charges. He also told Rogge and Ruth Green- [fol. 107] glass, his wife, immediately upon his apprehension and within a few days thereafter that he had deliberately told the F. B. I. conflicting stories at the time he was questioned upon his apprehension on the evening of June 15 and the early hours of June 16, 1950.

Were Rogge or his associates to be subpoenaed or were the records of Rogge's office and the office of the U. S. Attorney, to be produced in Court under a subpoena duces tecum, it will be disclosed that Greenglass did not "confess" to the authorities at the time of his apprehension or within a few days thereafter and that, far from cooperating with the authorities he intended to withhold "cooperation" until he had effected a satisfactory deal for himself and his wife.

The suppression of the truth on the part of Greenglass at the petitioners' trial with the consent and acquiescence of the prosecuting officials constituted a fraud upon this Court and resulted in a conviction which is violative of petitioners' rights under the Fifth and Sixth Amendments to the Constitution of the United States.

Concealment of Coached Evidence

Nineteenth: Government's Exhibits 2, 6, 7, and 8 were introduced in evidence on the basis of Greenglass' testimony.

Exhibit 2 was a purported replica of a sketch which Greenglass allegedly delivered to the petitioner Julius Rosenberg in January, 1945. It purportedly represented a lens mold made at the Los Alamos project (R. 439).

Exhibits 6 and 7 were replicas of sketches of a lens mold in schematic view that were later purportedly developed at the Los Alamos project.

Exhibit 8 was a purported replica of a sketch of a cross-section of the Nagasaki-type atomic bomb, a sketch of which [fol. 108] was allegedly delivered by Greenglass to the petitioner, Julius Rosenberg in September, 1945 (R. 498-99).

These exhibits were made by Greenglass after his apprehension: Exhibit 2, immediately after his arrest; Exhibits 6, 7, and 8, prior to the petitioner's trial for trial purposes (R. 439-41, 460-61, 463).

Greenglass swore that these exhibits were prepared by him from memory alone and that he was not aided in preparing them by any person or by any reading matter furnished to him by the authorities or any other person. On cross-examination, his testimony was:

> "Q. And when you drew the sketches—one of them I believe in June, 1950 and the other a day or two before you testified—and I think they are reflected and marked Government's Exhibits 2, 6 and 7—did you rely solely on your memory in making them?
>
> A. I did.
>
> Q. Now, when was the last day that you worked on the Los Alamos project?
>
> A. 1946, February.
>
> Q. What month?
>
> A. February.
>
> Q. That was about four and a half years ago?
>
> A. That's right.
>
> Q. And you relied solely on your memory?
>
> A. I did. (R. 609)

* * * * * * *

Q. Now, were you given any reference books or text books while you were in jail since your arrest, relating to any scientific matter?

A. No. I didn't—nobody gave me any.

Q. Did you read any scientific books while you have been in jail?

A. Just science-fiction." (R. 610)

And again, in answer to the Court he stated:

"The Court: . . . let me ask you: These sketches that are in evidence, are they the product of your own mind? By that I mean, were you helped by anybody outside in drawing these sketches?

The Witness: Nobody else, just myself.

[fol. 109] The Court: Did anybody tell you to change any line here or change any line there?

The Witness: Nobody told me anything like that." (R. 611)

This testimony was perjurious and must have been known to the authorities to be false.

Since all of these exhibits were prepared by Greenglass after he was already in the custody of the United States Government, he could not have been aided or coached by any person or reference books without the knowledge of the prosecuting authorities, or their agents.

Greenglass is a high school graduate, with no higher educational degree to his credit. He failed in the eight courses he took in a single semester at a polytechnical institution. His remaining adult education was confined to attendance for a year and one-half at a school of design. He never acquired a degree in science and engineering; nor has he ever taken any courses in calculus or advanced calculus, thermodynamics, nuclear or atomic physics, or quantum mechinist. He was a machinist by vocation in civilian life for a short time prior to his induction into the Army. During his Army career he was assigned to work as a machinist. (R. 610-15).

Renowned scientists have read the testimony given by Greenglass, and considered it in light of: (a) the time lapse between the alleged production of the sketches in 1945 and their alleged reproduction almost six years later;

and (b) his educational and vocational background and scientific knowledge, have attested as follows:

The affidavit of James Gerald Crowther, duly sworn to before a Consul of the United States in London, England on November 6th, 1952, annexed hereto, made a part hereof and marked "Exhibit C", states that, in the circumstances above described, in his opinion, it would have been "impos-
[fol. 110] sible" for Greenglass to have manufactured Exhibits 2, 6, 7 and 8 "relying solely on memory and without any outside aid".

The affidavit of Thomas Reeve Kaiser, duly sworn to before a Consul of the United States at Manchester, England, on November 10, 1952, annexed hereto, made a part hereof, and marked "Exhibit D", states that, in the circumstance above described, in his opinion it is "improbable" that Greenglass "could reproduce, in any detail" Exhibits 2, 6 and 7, after a lapse of five or six years and "relying solely on his unaided memory"; and that it was "inconceivable" that Greenglass could reproduce Exhibit 8 "without the aid or assistance of any person or written matter or help from any technical scientific source".

The affidavit of Jacques S. Hadamard, duly sworn to before a Vice-Consul of the United States, in Paris, France, on November 7, 1952, annexed hereto, made a part hereof and marked "Exhibit E", states that, in the circumstances above described, in his opinion, it is "highly improbable" that Greenglass "could have reproduced in any detail" Exhibits 2, 6 and 7, after a lapse of five years "relying solely on his unaided memory"; and that it is "inconceivable" that Greenglass could have reproduced Exhibit 8, "relying solely on his unaided memory".

Upon information and belief, Greenglass was in consultation with the co-conspirator Gold and others while the two were lodged under the roof of the same institution or institutions either at the Federal House of Detention at 425 West Street, Borough of Manhattan or at the "Tombs" at Centre Street, Borough of Manhattan. Some employees at these latter two institutions will, if subpoenaed, testify that books were brought in to places within these prison
[fol. 111] walls or in the Federal Building, Foley Square, New York City, for access to and reading by, Greenglass,

and, that he consulted with Gold and other persons for the purpose of enabling him to prepare Exhibits 2, 6, 7 and 8.

These exhibits went to the gravamen of the case and the core of Greenglass' testimony. As can well be understood, they constituted to the lay mind of the Jury, most damaging evidence. The suppression concerning the truth, that a hearing on this petition will more fully reveal, that these exhibits were literally "manufactured" for trial, is a most profound imposition upon the court and a measure of the magnitude of the extent to which the evidence on which the petitioners were convicted was a result of fabrication.

Schneider Testimony

Twentieth: The last witness for the Government, produced in rebuttal, was one, Ben Schneider. This witness' name did not appear on the Government's list of witnesses and the failure to give the petitioners advance notice, as required by statute, was excused on the ground that he was not known to the authorities until one day before the day he gave his testimony.

Schneider testified on March 27, 1950. He testified that he was first approached by F.B.I. agents the morning before and shown photographs of the petitioners, that he recognized them from those photographs, although on cross he admitted that he had seen but not recognized pictures of the petitioners which had appeared in the newspapers from the time of their arrest to the time he was approached by the F.B.I. He claimed the newspaper pictures were unrecognizable to him because they showed only a "front view", [fol. 112] and the F.B.I. agents had shown him "a front view and side view" (R. 1432).

On his direct examination Schneider testified in response to a question by the District Attorney, in part, as follows:

> "Q. Did you then deliver it to Mr. Rosenberg?
> A. Yes (R. 1429)."

This question referred to the witness' delivery to Rosenberg of passport photos allegedly taken by the petitioners and their two children in May or June, 1950, at the witnesses' photography shop at 99 Park Ros, Manhattan, New York City.

Then the prosecution asked the following questions and received the following answers from the witness:

"Q. Did he pay you?
A. That's right, sir.
Q. *And is that the last time you saw him* before today?
A. *That's right.*" (R. 1429) (emphasis ours)

Upon information and belief this testimony was perjurious. The ground of information and the source of belief are a book published after the trial of the petitioners, in 1952, by Oliver Pilate, entitled "The Atom Spies" (G. P. Putnam Sons, New York). On page 287 of this work the author states:

"Julius and his lawyer scoffed at the idea that the Rosenbergs ever had any notion of leaving the country. *While Julius was still on the stand, an FBI agent brought into the courtroom a photographer* from a shop hardly a block away who recalled somebody resembling the description of Rosenberg, with two wild kids, coming in for passport photos. *He wanted a look at Rosenberg to be sure,* and when he took the look, he nodded. He was the next witness, a devastating one. He described the wild behavior of the Rosenberg boys, then recalled that Rosenberg had boasted that his wife had just inherited a large sum from a relative in France, and that the family was planning a trip to Europe to collect the inheritance." (emphasis ours).

The petitioner Julius Rosenberg was on the stand on March 26. It is apparent that Schneider did see the Rosen- [fol. 113] bergs for purposes of identification the day *prior* to his own testimony. It is a fair inference that the prosecuting officials aided him to come into the courtroom, in contravention of the trial Court's order excluding all witnesses from the courtroom except in the course of their testimony.

The prosecution authorities, therefore, knew that Schneider lied when he said that he had not seen the petitioner Julius Rosenberg from the time of the taking of the alleged photographs, in May or June, 1950, to the time he took the

stand on March 28, 1951 and identified the petitioners in open court. On a hearing on this petition, the petitioners will be enabled to produce evidence of this knowing fraud upon the Court.

Schneider's testimony was a dramatic climax to the trial and introduced harmful and damaging evidence against the petitioners. It served to corroborate Greenglass' otherwise uncorroborated story, that the petitioners were intending to flee the country and that they were making preparations to accomplish that purpose by taking passport photos (R. 529). And it served to relate more directly to these petitioners evidence concerning the alleged "flight" of the co-defendant, Morton Sobell (R. 919-935).

Were it known to the jury that this "aid" to Schneider's recollection was necessary to accomplish his identification of the petitioners, it might have attached no credence to the testimony of this otherwise patently suspect witness.

The conviction of the petitioners was steeped in fraud aided and abetted by the prosecuting officials. It was an imposition on the court, the jury, the entire administration of criminal justice. This official condonation of false testimony must nullify the conviction which was obtained upon it.

[fol. 114]

III

The "Secrecy" of the Information Alleged to Have Been Transmitted

Twenty-first: *United States* v. *Heine*, 151 F. 2d 813, 815 (C.C.A. 2nd, 1945), cert. den. 328 U.S. 833, construed the Espionage Act to read that, unless the information alleged to be the subject of transmittal—or conspiracy to transmit—to a foreign nation is "secret", no crime is committed under that law. "Secret" information, as defined by the *Heine* case and *Gorin* v. *United States*, 312 U.S. 19 (1941), has the meaning accorded to the more common usage: "classified" information.

The testimony at the trial of the witnesses Walter S. Koski and John A. Derry attested that the information, in the instant case, allegedly transmitted to the Soviet Union, and the subject of the alleged conspiracy to transmit, was "secret", classified matter (R. 466-86; 903-917).

The petitioners represent, as set forth below, that the United States Government or one or more of its agents arbitrarily and capriciously classified the aforesaid material as "secret"; and that, in fact, it was not "secret", but widely known and published throughout the world—and, especially in the Soviet Union, the alleged beneficiary of the transmittal.

I. General Statement on the Secret of the Atom Bomb

There were three principal military secrets of the atomic bomb.

The first of these was whether the existing technology in any country or group of countries could produce the needed materials in the quantity and of the purity required for the detonation process.

The second secret was whether such a bomb, if assembled, would actually explode, and explode with the violence which [fol. 115] had been theoretically predicted.

The third secret was the rate of production of atomic bombs, clearly, if only one or two could be produced every ten years, this weapon would be of minor military importance. On the other hand, if production of large numbers were possible in a reasonable period of time the bomb would become an important factor in current military theory.

Any other so-called secrets were minor, subsidiary in character, or no secrets at all. For example, the necessary theoretical physics for the production of the bomb was never a secret. It was internationally known by 1940. H. D. Smyth in his well-known report on "Atomic Energy for Military Purposes", Princeton Univ. Press 1945, documents this point quite fully in his introductory chapter. After detailing the developments of theory which led to the decision to make atomic bombs, he states in paragraph 1.60:

> "Looking backward to the year 1940, we see that all the prerequisites to a serious attack on the problem of producing atomic bombs and controlling atomic power were at hand. It had been proved that mass and energy were equivalent. It had been proved that the neutrons initiating fission of uranium reproduced themselves in the process and that therefore a multiplying chain reaction might occur with explosive force. To be sure,

no one knew whether the required conditions could be achieved, but many scientists had clear ideas as to the problems involved and the direction in which solutions might be sought."

Of the three really important secrets, the first two were simultaneously revealed to the world when the Hiroshima bomb was exploded. The responsible authorities of the Manhattan Project quite clearly recognized that a very large part of the entire project was not a real secret by issuing the Smyth Report, and by the relatively prompt declassification of project material now being published by the McGraw-Hill Publishing Company of New York as a National Nuclear Energy Series. Some fifty volumes have already been published, or will be published soon.

[fol. 116] The Smyth Report outlined all the basic steps involved in bomb production. It related, for example, the successful processes for the separation, in large quantity, of the critical isotope, uranium 235. It described many problems—and their solutions—associated with the pile; it told of the proper moderators to use for slowing down neutrons. It spoke in detail of the production of Plutonium 239, another explosive element. A section of the report was devoted to the principle of detonation of the bomb. The book included photographs of plants which had been built, and thus revealed the magnitude of the required facilities. In sum, it was a full, although qualitative, description of the most important technological problems which had been encountered, and of the methods of solution worked out in this country. It was published in 1945, shortly after the Hiroshima bomb was dropped, because what it related was not a secret.

The third major secret—whether the bomb is a curiosity or a potentially important weapon—has been revealed by the large number of bombs exploded for experimental purposes. Quite obviously, if the bomb production rate were one a year, any government would hesitate about detonating any considerable fraction of its stock-pile for experimental purposes.

This petition will demonstrate the following: It will first indicate the general problem of atomic bomb production in order to show the overall process and the interrelations of

its many parts. It will demonstrate that the details of the detonation mechanism are but a miniscule part of the whole gigantic operation. It will also show that the details of any particular detonating element need not be known to produce the bomb because there are many alternative paths. [fol. 117] It will then prove that the secret of the detonating mechanism—allegedly the secret transmitted by David Greenglass to the U.S.S.R.—is no secret at all. At the time of the trial, it was held by the Government and its witness, Walter S. Koski, that the theory of "implosion" utilized for the purpose of assembling the critical mass of fissionable metal was invented and developed at the Los Alamos Project. The falsity of this statement will be shown by direct reference to the scientific and patent literature available prior to the initiation of the Manhattan Project.

II. General Problem of Atom Bomb Production

A. The Relationship of the Detonating Mechanism to the Overall Process

There are four major steps in the production of an atom bomb. These include: a) the preparation of the many pure compounds, metals and elements required at the start; b) the use of the starting materials for the preparation of the fissionable isotopes Uranium 235 and Plutonium 239; c) the conversion of these isotopes into pure metallic form operating now with small subcritical batches of material; and d) arranging the pure fissionable metal in a device so that at the appropriate time a mass in excess of the critical mass can be assembled with great speed and thus detonated.

To understand the magnitude of the effort and the multitude of paths by which one may proceed in developing an atom bomb, a brief review of processes at each level will be presented.

To make bombs a sizable quantity of pure Plutonium 239 or pure Uranium 235 is needed. This quantity must be as many times larger in its magnitude than the critical mass as are the number of bombs to be produced. The metal must be extremely pure. A bomb can be made from this [fol. 118] very pure metal utilizing at least three different methods: a) That of firing two subcritical masses together;

b) that of compressing the critical mass from a sponge form to the very dense form of the metal; and c) that of suddenly placing a neutron reflector around a mass of metal not presently in the critical conditions. All three of these methods have been variously discussed as possibilities and we can see that in this final phase there are these three methods for achieving detonation. No doubt each was tried in a great variety of combinations.

Going to the step which precedes detonation, we come to the preparation of the pure fissionable metal. This step requires the preparation of metal in very small subcritical batches. It is evident that this is necessary, else otherwise a self-sustaining nuclear reaction would begin. The methods of preparing pure metals are many and are varied. To list only a few that are commonly used by chemists, there are the reduction methods of the halogen compounds of these metals by more active metals like sodium, potassium, calcium, magnesium, aluminum and so forth. There are also reduction methods utilizing an electrical current with which the metal is plated out on an electrode. All of these and others were no doubt tried.

The step which precedes the final preparation of the pure metal is obviously its synthesis. There are two general methods for effecting the synthesis of fissionable metals. The first of these is a direct separation of Uranium 235 from naturally occurring uranium. The second method is that of synthesizing an element like Plutonium 239 by a nuclear transformation of Uranium 238 into it, i.e., the method of synthesis in the pile. The first of these, that of concentrating the least abundant isotope of uranium, may be effected in a great many ways, all of which have been investigated [fol. 119] in this country and discussed in the Smyth Report. Among the methods discussed in that report were: a) Gaseous diffusion; b) Electro-magnetical separation; c) Centrifugation; d) Chemical exchange methods; e) Thermal diffusion methods. Each of these requires a huge plant and many subsidiary factories to make the necessary parts. Each one conservatively estimated would be more than a hundred million dollar industry.

Among the methods for producing plutonium in a pile one may use uranium with any one of a number of different

moderators so that we would have the possibility of: a) a helium moderated pile; b) a heavy water moderated pile; c) a beryllium moderated pile; d) a graphite moderated pile. There are also the possibilities of operating breeder type piles which involve much less moderation of the neutrons to achieve their effect. In any event, there are at the stage of fissionable element synthesis nearly a dozen ways to proceed. Again each of these requires a gigantic plant and many subsidiary industries. The construction of each such plant is in the 250 million dollar class of expenditure. The step which precedes the element synthesis stage is the one in which the pure raw materials needed for this work are made. There are many different kinds of compounds needed in an atomic energy program and in many cases whole new industries must be created for the production of individual compounds. Of these we may list the preparation of pure uranium compounds such as uranyl nitrate, the uranium oxides, uranium hexafluoride, the preparation of pure uranium metal itself in tonnage quantities, the preparation of tonnage quantities of the rare isotope of hydrogen, i.e., deuterium, the preparation of extremely pure graphites of high specific gravity, the preparation of aluminum tubing and jacketing materials for the uranium slugs, all of which must be of the highest chemical purity, [fol. 120] the preparation of pure beryllium compounds, the preparation of tonnage quantities of many of the fission fragment chemicals. Most of these substances required the development of completely new plant processes in this country in order to have these ready as needed by the atomic energy program.

Now from the mere recital of these many different processes it may be seen that there are a vast multitude of ways by which one may arrive at the final production of the bomb. The policy of the United States during the war was to depend on no one process so that at none of the four critical stages could a bottleneck develop. Thus, at every stage a group of parallel efforts along different lines was made. Hence it can be seen that any single process, any single detail of any process, such as one particular method for atom bomb assembly, represents the most minute part of the whole program. The small effort involved in any

particular method of atom bomb assembly, represents the most minute part of the whole program. The small effort involved in any particular method of atom bomb assembly is indicated by the much smaller staff assembled to work on the final phases of atom bomb construction. (In this connection see the Rabinowitch quotation below.)

It is evident, therefore, that for any country to produce atom bombs a highly developed technology is as essential as is a highly competent corps of theoreticians. This means that in a particular nation there must exist not only people with scientific, engineering and mechanical skills, but also the physical plant in different areas of manufacture, transportation, power, communication and other fields. By way of example, the following, among others are essential:

[fol. 121] (a) A highly developed electrical industry, whether based on coal or hydro-electric power;

(b) A highly developed and productive metallurgical industry, capable equally of making relatively large amounts of pure new metals like uranium, as well as conventional steel and other alloys required for construction and other phases of bomb maunfacture;

(c) A highly developed chemical industry, because of the necessity of making extremely pure materials in large quantity—whether carbon, heavy water, or fluorine.

(d) A well-developed mechanical electronic and instrumental industry, in order to make the large numbers of precise controlling mechanisms which are obviously required for those parts of bomb manufacture (including isotope separation) which must be run automatically.

(e) A large and efficient construction industry. One need only to look at the pictures of the Oak Ridge and Hanford plants which are reproduced in the Smyth Report (page 138) to realize that the bomb cannot be built in a mud hut.

(f) A well-developed transportation industry. This is obviously necessary in order to schedule the orderly shipment and receipt of the tonnage quantities of raw, semi-finished and finished products and materials associated with bomb manufacture.

The vastness of the scientific, engineering and manufacturing effort which went into the making of the bomb must

be realized for a true picture of what is involved. The estimate has been made that some two billion dollars—perhaps one per cent of our national income at the time—was expended before the first bomb was exploded. It was an effort which required the cooperative efforts of several hundred thousand people with diverse skills. (Thus, the population [fol. 122] of Hanford, Washington, at the pile site, is given as 60,000 in 1944, Smyth Report, Page 146.) In short, in order to make atomic bombs, a nation must have a well-developed technology in all fields of engineering and manufacture, as well as a large corps of well-trained scientists, engineers and skilled workers.

This point is well made in the Smyth Report, in Chapter 13, Section 3 (page 224):

> "Before the surrender of Germany there was always a chance that German scientists and engineers might be developing atomic bombs which would be sufficiently effective to alter the course of the war. There was, therefore, no choice but to work on them in this country. Initially many scientists could and did hope that some principle would emerge which would prove that atomic bombs were inherently impossible. This hope has faded gradually; *fortunately in the same period the magnitude of the necessary industrial effort has been demonstrated so that the fear of German success weakened before the end came.* By the same token, most of us are certain that the Japanese cannot develop and use this weapon effectively." (Our emphasis.)

This statement is interesting and pertinent for several reasons. In the first place, the fear of German success most obviously did not abate because Germany did not have the necessary industrial plant. Merely to make the statement is to demonstrate its ridiculousness. The fear of German success decreased because Germany was in no position at the time to devote the necessary industrial plant (which she had) to making the bomb. The same can be said of the U. S. S. R.—i.e., that almost all manufacturing facilities were devoted to the more immediate problems of getting out implements of warfare already tested in the field. It is primarily for this reason that the U. S. S. R. did not develop the

bomb during the war—because the large scale manufacturing effort could not then be made. It will be recalled that this was at a time when much of her industry was destroyed, a large part of her industrial areas overrun by the invader, and a frightening percentage of her people killed or under occupation.

[fol. 123] With the end of the war, a reassessment of the desirability of making atomic fuels and explosives could be made. This reassessment must have been spurred by the disclosure of the one real secret involved in the bomb—it could be successfully made and successfully exploded. The Smyth Report says that the hope that it could not be made faded gradually. This means that it was not known for some time that it could be successfully exploded. In the absence of the knowledge that the quest could be successful, any nation would hesitate before launching upon the scale of expenditure that is so necessary. However, once a bomb has been made, even though the many tons of blueprints associated with it was not available, the knowledge that success has been obtained must of necessity enter into calculations of whether to proceed or not. In addition, knowledge that the end was successful also means that more time can be spent in developing many alternatives paths to that end.

As a consequence, it is clear that there were an enormous number of combinations of methods by which success could be achieved. In time of peace it would be possible to decide which were the more efficient. In time of war and of hastily made decisions it was only necessary that a process work; efficiency was secondary.

It is also clear that in such an industry no one process was of overriding importance—no one technical detail critical even though at the time individuals might have thought so.

In this vast array of processes any single method for the assembly of the fissile materials was just another detail—just another of the many thousand details of the whole operation. To illustrate the validity of this assertion, suppose that failure was encountered at any of the stages where the pure isotopes were being prepared. Then no matter how [fol. 124] wonderfully ingenious the device for assembling the metal, it would have been quite useless.

On the other hand, suppose that any country of moderate

technological ability were given the necessary amounts of the pure fissionable metals. How long would it take them to produce a detonation? It seems likely that only a few months would be needed. Quoting from a pertinent article in the Bulletin of the Atomic Scientists by Professor E. Rabinowitch (May 1951 issue, p. 139) on this very point we find:

> "According to the Senate testimony of Admiral Parsons, the principles of these mechanisms were clearly established within a very short time after the beginning of this work. Considering that this research was, to a large extent, in internal ballistics, a field in which Russia has had a more extensive experience than the United States and in which it possessed a considerable number of first-class specialists, it is unreasonable to assume that even the necessity of solving these secrets on their own would have delayed the Soviet progress, if at all, by more than a few months. Perhaps they would have arrived at a solution different from those developed at Los Alamos; but whether their mechanism would have been (or, in fact, is) less or more efficient than ours, we do not know (unless this information has been provided by an American agent in the Soviet atomic project).
>
> "It has often been pointed out that the bottlenecks in the development of the atomic bomb project during the war have not been in the establishment of basic facts or the blueprinting of technical solutions, but in the actual construction of the large production plants. There is no reason to assume that the same was not true of the Soviet progress as well. This means that the speed of this progress probably was determined by factors on which spying had but little, if any, influence—except possibly, by inducing their earlier initiation."

Thus it seems quite evident that the detail of the atom bomb is trivial technically and most inconsequential as a secret.

[fol. 125] B. The Production of Atom Bombs in the U. S. S. R.

From what has gone before it is obvious that any nation which seeks to produce atom bombs must have not only an extensive corps of junior and senior scientists but in addition it must have a highly developed technology and industrial apparatus. When it sets up such a two billion dollar industry with its 200,000 employees, that industry is controlled by the framework of the social organization of the country as well as by the kinds of goods manufactured and the methods of manufactured available to it. In such a context no one detail of an American process, obtained through espionage or otherwise, can have even the little importance that it had in the industry where it was developed. What is good American manufacturing practice may in Soviet hands be otherwise and vice-versa.

The purpose of this section is to show that the U. S. S. R. did in fact have the necessary scientists and technology for doing the job and that the principal reason that it could not make atom bombs during the course of the war was that all of its available manufacturing facilities were devoted to the more immediate necessity of producing well tested implements of war. It did not need any American "secrets" to produce a bomb.

That the U. S. S. R. had first rate scientists in this field may be demonstrated in several ways. One of these is to compare their discoveries in relation to our own. This is illustrated in the following table, which demonstrates, in the field of nuclear physics, simultaneity of discovery and development in the U. S. S. R. and the U. S. A.

1) Theory of fission of the uranium nucleus:

N. Bohr and J. Wheeler—Physical Review, Volume 56, page 428 (1939)—from Denmark and the U. S. A., and J. Frenkel, Journal of Physics, U. S. S. R., Volume I, page 125 (1939)—in the U. S. S. R.

[fol. 126] Theory of the Pile

E. Fermi, and others in the U. S. A.—1939 to 1940, reported in "Atomic Energy for Military Purposes",

by H. D. Smyth, Princeton, 1945, and J. Zeldovich and J. Khariton, Journal of Experimental and Theoretical Physics (USSR) Volume 9, page 1425 (1939) and Volume 10, page 29 (1940) in the USSR.

3) Theory of the Synchotron

E. McMillan, Physical Review, Volume 68, Page 143 (1945) in the U. S. A., and V. Veksler, Journal of Physics, USSR, Volume 9, page 153 (1945) in the USSR.

4) Operation of the Betatron

Dr. D. W. Kerst, Physical Review, Volume 60, page 47 (1941) for earlier work, and Physical Review, Volume 68, page 233 (1945) in the U. S. A., and
J. Terletsky, Journal of Experimental and Theoretical Physics (USSR) Volume 11, page 96 (1941) and Journal of Physics (USSR), Volume 9, page 159 (1945) in the USSR.

5) Resonance Method for Nuclear Magnetic Moments

Purcell, Torrey and Pound, Physical Review, Volume 69, page 37 (1946), and Bloch, Hanson and Packard, Physical Review, Volume 69, page 127 (1946) in the U. S. A., and
V. Zavoisky, Journal of Physics (USSR), Volume 9, pp. 211, 245, 477 (1945) in the USSR.

The idea of a monopoly in fundamental knowledge and fundamental theory is a most improbable one. Any advantage in time in the realm of theory is so temporary as to be considered non-existent. In the past, in periods long before the development of communications brought the world together, fundamental knowledge was developed more or less simultaneously, and was widely shared. Today this process has markedly accelerated.

The point must now be made that in the USSR there are scientists whose researches in fundamental problems are [fol. 127] of first-rate importance. There is also a competent corps of junior scientists in various fields who have made contributions as well. This is illustrated in the follow-

ing admittedly incomplete table of papers from Soviet physicists and chemists in the field of nuclear physics:

1. A particular mode of fission of the uranium nucleus.—Chlopin, Passwik—Chlopin and Wolker—Nature, 144, 595 (1939).

2. Electro-capillary theory of splitting of heavy nuclei by slow neutrons—Frenkel, J.—Exp. Theor. Phys. USSR 9, 641 (1939).

3. On the splitting of heavy nuclei by slow neutrons—Frenkel—J. Phys. Rev. 55, 987 (1939).

4. On some features of the process of fisson of heavy nuclei. Frenkel—J. Phys. USSR 10, 533 (1946).

5. Registration of uranium fission fragments with removal of background due to alpha particles emitted by uranium. —Perfilov—Comptes Rendus USSR 47, 623 (1945).

6. Chemical nature of the radioactive fragments of thorium fisson. Radioactive halvgens. —Polessitsky, Orbeli and Nemewsky—Comptes, Rendus, U*RSS*, 28, 215 (1940).

7. A new method of recording of particles of the type of uranium fragments by means of a photographic plate.—Perfilev—J. Phys USSR. 10, (1946).

8. The first USSR cyclotron. — Rukavichnikov — Phys. Rev. 52, 1077 (1937).

9. Investigation of the phasing properties of the relativistic resonance accelerator. I. Synchotron. II. Cyclotron with varying frequency of dee voltage (phasotron)—Rabinovich—J. Phys. USSR. 10, 523 (1946).

10. A new method of acceleration of relativistic particles —Veksler—C. R. U*RSS*. 43, 329 (1944).

11. A new method of acceleration of relativistic particle. —Veksler—J. Phys. USSR. 9, 153 (1945).

12. Concerning some new methods of acceleration of relativistic particles—Veksler—Phys. Rev. 69, 244 (1946).

13. Solid body model of heavy nuclei.—Frenkel—Phys. Z. Sowjetunion 9, 533 (1936).

14. On the spectroscopy of heavy nuclei, II. Rotation and magnetic excitation levels of heavy nuclei in conjunction with soft gamma rays—Frenkel—J. Phys. USSR 4, 493 (1941).

15. Collisions of deuterous with heavy nuclei—Lifschitz —Phys. 2, Sowjet. 13, 224 (1938).
[fol. 128] 16. Quadrupole and diple gamma radiation of nuclei—Migdal—J. Phys. USSR. 8, 331 (1944).
17. Directional distribution in beta decay—Predmestnikow—Phys. Z. Sowjet 13, 32 (1938).
18. Beta radioactivity and nuclear forces. Z. Sowjet 10, 567 (1936).
19. Constitution of atomic nuclei—Iwanenko—Comptes Rendus Paris 1935, 439 (1932).
20. The dipole character of the meon, etc.—Iwenenko and Sokolow—J. Phys. USSR, 5, 175 (1943).
21. Statistical theory of nuclei—Landau—Phys. Zeit—Sowjet-union, 11, 556 (1937).
22. On the interpretation of beta disintegration data—Alichanian and B*E*restezky—Physical Rev. 55, 927 (1938).
23. Binding energy of the atomic nucleus and alpha decay.—Cherdynzev—Phys. Z. Sowjetunion 13, 170 (1938).
24. Ionization of the atom due to beta decay—Feinberg—J. Phys. USSR 4, 423 (1941).
25. On the four pole beta spectrograph—Korsunsky— J. Phys. USSR. 9, 14 (1945).
26. The Geiger-Mueller counter with a hollow anode—Mikhalevas—J. Phys. USSR. 10, 296 (1946).
27. Energy of conversion electrons arising in the transformation of bromide isomers—Roussinow and Yusephovich—Comptes Rendus URSS 24, 129 (1939).
28. On nuclear isomers with long life time—Roussinow and Igelnitski—Comptes Rendus URSS 47, 333 (1945).
29. Long-period radioactivity in Ag, (sand Inactivated by slow neutrons—Alexeeva—Comptes Rendus URSS 18, 553 (1938).
30. Energy spectrum of positive electrons ejected by radioactive nitrogen—Alichanov, Alichanian and Dzelepow —Nature 133, 950 (1934).
31. Artificial radioactivity by neutron bombardment—Kurt—Schatow, Latyschew, Nemenov and Selinow— Physikalische Zeitschrift der Sowjetunion 8, 589 (1935).
32. Properties of electrons and mesonspinin the classical approximation—Galanin—J. Phys. USSR. 6, 35 (1943).
33. Hyperfine structure of secondary x-ray spectra—Krasnikov—Comptes Rendus URSS 49, 337 (1945).

34. Proper masses and magnetic moments of elementary particles and the Wentzel—Dorae x process—Markov—Comptes Rendus U*RSS* 47, 177 (1945).

[fol. 129] 35. Coherent scattering of gamma rays of nuclei—Akhieser and Pomerantschuk—Phys. Kalische Zeitschrift der Sowjetunion 11, 478 (1937).

36. On the scattering of low energy neutrons in helium—Akhieser and Pomerantschuk—J. Phys. USSR. 9, 461 (1945).

37. Scattering of relativistic electrons through large angles—Alichanian, Alichanow and Weissenberg—J. Phys., USSR 9, 280 (1945).

38. An equation for the scattering of particles, taking into account the reaction of emission—Blokhintzev—Comptes Rendus URSS 53, 201 (1946).

39. On nuclear scattering of mesotrons—Ginsberg—J. Phys. USSR. 10, 298 (1946).

40. Scattering of neutrons by protons—Goloborodko—J. Phys. USSR. 8, 13 (1944).

41. On the theory of scattering of protons by protons—Landau and Smorodinsky—J. Phys. USSR 8, 154 (1944).

42. The scattering of fast electrons—Kulchitsky and Latyshev—J. Phys. USSR 5, 249 (1941).

43. Transfer of neutrons between nuclei in heavy nuclei in collisions—Lifschitz—Journal of Experimental and Theoretical Physics, USSR 9, 237 (1939).

44. Scattering of slow neutrons in a crystal lattice, Pomerantschuk—Physikalische Zeitschrift der Sowjetunion 13, 65 (1938).

45. Nuclear scattering of electrons in this metallic films. I.—Petukhov and Vyshinsky—J. Phys. USSR 4, 235 (1941).

46. The effect of long-range order in alloys on the scattering of slow neutrons—Smirnov and Vonsovsky—J. Phys. USSR 5, 263 (1941).

47. On the scattering of neutrons by protons—Smorodinsky—J. Phys. USSR 8, 219 (1944).

48. Scattering of mesons taking damping into account—S. Kolon—J. Phys. USSR 5, 231 (1941).

49. Thresh old value for nuclear excitation if Indium-115 by x-rays—Lorsunsky—Comptes Rendus USSR 26, 144 (1940).

50. An investigation of "Bremstrahlung" by means of

excited Indium-115 nuclei—Korsunsky, Walther, Ivanov, Zypkin and Ganenko—J. Phys. USSR 7, 129 (1943).
[fol. 130] 51. Chemical investigation of short-lived artificial radio-elements—Polessitsky—Physikalische Zeitschrift der Sovjetunion 12, 339 (1937).

52. Beta spectre of artificially produced radioactive elements Alichanow, Alichanian and Dzelepow—Nature 136, 257 (1935).

53. Gamma rays from radioactive iodine—Bak and Nikolaevskaya—Comptes Rendus USSR 22, 312 (1939).

54. Internal conversion of gamma rays from KaC—Constantinov and Latyshev—J. Phys. USSR 5, 239 (1941).

55. Formation of pairs in gases by gamma rays from ThC—Grosher—J. Phys. USSR 5, 115 (1941).

56. The recoil electron spectrum of gamma rays from Thorium active deposit—Latyschev and Kulchitsky—J. Phys. USSR 4, 515 (1941).

57. Angular distribution of phot-neutrons from beryllium —Goloborodko and Rosenkewitsch—Phys. Z. Sovjetunion 11, 78 (1937).

58. Slowing down of neutrons by nuclei of heavy elements —Lukirsky and Couva—C R YRSS 3, 411 (1936).

59. On the absorption of fast neutrons by heavy nuclei— Mescheryakov Comptes Rendus URSS 48, 555 (1945).

60. Passage of fast neutrons through beryllium—Russinow—Phys. Ziet. Sovjetunion 10, 219 (1936).

61. On the frequency of even and odd atomic nuclei— Cherdynzev—Comptes Rendus URSS 33, 22 (1941).

62. Angular distribution for the interaction of mesons with nuclei—Feinberg—J. Phys. USSR 5, 177 (1941).

63. Movement of the meson in a homogeneous magnetic field—Galanin—J. Phys. USSR 6, 27 (1943).

64. Theory of interaction of mesons with the electromagnetic field—Ginsburg—J. Phys. USSR 5, 47 (1941).

65. On the determination of symmetry of nuclear spin functions—Godnen—Comptes Renus URSS 43, 194 (1944).

66. Energy levels of a heavy nucleus. Gurevitsch—Phys. Zeit, Sowjetunion 12, 489 (1937).

67. Pair production at beta disintegration—Tisza—Phys. Zeit, Sowjet. 11, 425 (1937).

Related areas of work by Soviet scientists include the construction of large electrical installations, like a 4.5 million volt van de Graaf electrostatic generator in 1937, and [fol. 131] several cyclotrons. There is in addition the work of A. E. Brodsky, a member of a commission set up by the Soviet Government in 1937 to accelerate research on isotope separations. Brodsky has published work on the separation of heavy water, on a theory of isotope separation by thermal diffusion in cascade processes, and (in 1942) made an estimate of the power which might be required for the separation of uranium 235 from the other uranium isotopes by thermal diffusion of the hexafluoride. The references follow:

Brodsky and Skaare, Journal of Physical Chemistry (USSR), Volume 13, page 451 (1939), and Acta Physicochemica, Volume 10, page 729 (1939). Papers on the separation of heavy hydrogen and oxygen by Thermal diffusion.

A. E. Brodsky, Journal of Applied Chemistry (USSR) Volume 13, page 670 (1940). Paper on various methods of preparing heavy water.

A. E. Brodsky, Acta Physicochemica, Volume 17, page 224 (1942). Paper on estimated costs for the separation of uranium isotopes by thermal diffusion of uranium hexafluoride (the process used at Oak Ridge). *It should be realized that this paper was published at a time when such material was handled as secret matter in the U.S.A.*

Similar accounts can be drawn up for other fields-physicalchemistry, organic chemistry, electrical, mechanical and civil engineering, applied and fundamental mathematics.

A conclusion which must be drawn from this account is that before the war there was a sufficient number of competent Soviet theoretical and experimental scientists so that independent development of the necessary nuclear theories could have been expected; so that simultaneous development was quite likely, and so that a serious lag behind other countries was so improbably as to be almost impossible.

[fol. 132] If we recognize these elementary facts that

(a) The U.S.S.R. had the staff for bomb manufacture and that

(b) The U.S.S.R. had the plant or had the potentiality to build the plant required

then it follows that they needed no help from us. The idea, commonly held, that without the activity of atomic spies, the Soviet Union would not now and, for many years to come, be able to make a bomb is seen to be one of wildest fancy. It is an idea held by none of leading American scientists who directed this great effort.

III. *The Explosive Lens in the Atomic Bomb*

Dr. Walter S. Koski, a Government witness, testified during the trial (R. 656-683) that a converging force wave was used to bring together the critical mass of the bomb with the required speed (R. 660). He applied the term "Implosion" to these converging waves (R. 673), and testified that these processes were not previously known. He said that "there was no information in text books or technical journals on this particular subject."

This testimony is incorrect. We shall show that:

1) The general idea was used in the Middle Ages;

2) An important variant was published in 1888;

3) A number of patents were issued on applications of the idea during the last forty years;

4) One particular device invented in 1941 or earlier is very much like the explosive lenses described in the trial, and

5) The theory and practice of convergent shock waves was widely understood in the U.S.S.R. before 1945.

[fol. 133] A. The History of the General Idea of a Convergent Shock Wave

In medieval times a military device was used which was known as the petard. This consisted of a bell-shaped container into which an explosive charge was inserted. The mouth of the bell was then placed against the wall of a

fortification. When the charge was detonated, a powerful force wave emanating from the bell mouth would punch a hole in the forrifications. The unusually destructive action of the petard arose from the fact that the container held the explosive at the face of the fortification for a time interval. This interval was small, but was sufficient to give focusing and direction to the blast.

The device is described in the New English Dictionary, Clarendon Press, Oxford, England (1905 edition). The earliest reference given is in the year 1580.

A more advanced form of the petard as a missile was developed in the United States by Joseph H. Church and Wilfred E. Thobodean approximately ten years ago. They later filed a patent application on April 23, 1941 which was subsequently granted a U. S. Patent 2,412,967. Their design was based on theoretical considerations about focused force waves which had been previously outlined in a German explosives journal (Zeitschrift fur das gesamte Schiess und Sprengstoffwesen, May 15, 1914, pages 183-187).

B. The Variant of Munroe

The petard uses a container to focus the shock wave of the explosion. It is possible to mold the explosive itself into shapes which, upon detonatio-, directly produce focused shock waves. Such devices are called hollow charges, shaped charges, explosive lenses, and other similar names.

[fol. 134] The basic principle of these shaped charges appears to have been known in Europe during the eighteenth century. In the United States it is known as the Munroe effect, taking its name from Professor C. E. Munroe, who discovered it when he was working at the U. S. Naval Torpedo Station and War College from 1886 to 1892.

The effect was publicly described by Munroe in articles written for Scribner's Magazine (Volume 3, pages 563, 576 (1888) and in the Popular Science Monthly (Volume 56, pages 453-454 (1900)).

C. Patents Based on the Mur[illegible]e Effect

The Munroe effect is the [illegible] of a number of devices described in the earlier [illegible]:

German Patent [illegible], where the principle of obtaining an i[illegible]ng effect by coning or recessing the [illegible]ating charge is described.

British Patent # 2[illegible] (1911). The effect is employed in the explosive charge of a projectile fired from a gun.

U. S. Patent # 1,440,601 (1923) where the convergent force effect is rediscovered by J. R. Holran apparently without knowing of Munroe's work.

U. S. Patent # 1,534,001 (1925) in which a focused charge is used in the percussion fuse of a shell.

U. S. Patent # 1,810,000 (1931) which describes and illustrates principles of the focused charge in relation to boosters for use in exploding shells, bombs, grenades, torpedoes, etc.

In addition, before 1943 there were filed and processed to varying degrees patents based on this principle which related to shells (U. S. 2,426,997, U. S. 2,413,680, and U. S. 2,579,323), to the boring of holes in pipes and casings (U. S. 2,399,211), the cutting of holes in plates (U. S. Re. 23,-211), bazooka type projectiles for puncturing armor (U. S. [fol. 135] 2,427,989 and 2,441,388), and the use of convergent force waves for driving masses of metal at high velocity (British 613,613 and U. S. 2,407,264).

D. Experiment of R. W. Wood.

In a paper published in the Proceedings of the Royal Society (A *157*, 249-261 (1936) this author reports the application of convergent force waves to the explosive compression of metal sheets or plates into spherical masses. He investigated the way this occurs following detonation of his shaped charge. He followed step by step the action of the force wave in causing the sheet of metal to flow into a spherical form. He devised simple experimental techniques for studying these rapid processes. All in all he

anticipated and solved the problem of the explosive assembly of bomb metal. His work clearly provides the understanding that led Mohaupt to reduce this process to commercial practice.

E. The Mohaupt Patent

It will be recalled that the principle of the Nagasaki bomb design was that of compacting a mass of metal of critical size at high velocity. The details for doing this were allegedly given by Greenglass to Harry Gold, and were believed to be of a secret nature. Even this development is anticipated in the patent literature in an application filed in 1941 by Henry Habs Mohaupt and assigned by him to a Swiss corporation in Fribourg, Switzerland. The company involved was the Societe Anonyme de Ges ion et d'Exploitation de Brevets.

In this patent (U. D. 2,419,414) a shaped charge is used to compact metal into a precise rod shaped mass. The metal is initially in the form of a ring located at the interior wall of a cylindrical container. Because of the [fol. 136] focused shock wave of a shaped charge this ring collapses and is reassembled in the rod-shaped mass alluded to above. The metal is also liquified by this process, and accelerated to a velocity in excess of 18,000 feet per second.

It is obvious that a high level of understanding of shaped charge theory was utilized in this device. Further evidence of this understanding becomes apparent from inspection of the sketches of the projectile. It will be seen that the cross-sectional shape of the ring is triangular; there is use of a metal cone for the shaped charge and there is use of a hollow cylinder for a further focusing guide effect. These are all indications of the high level of understanding of this explosives expert.

Except for the fact that the Mohaupt ring was made of steel rather than uranium 235 or plutonium 239 and that he started and ended with somewhat different shapes than may be required for the atomic bomb, the essential features of metal compaction are here outlined and are public knowledge more than three years before the atomic bomb work of the Los Alamos group.

F. Detonation Theory and Practice in the U. S. S. R.

In 1925 M. Ya Sukharevsky published two papers, entitled "Study of the Possibility of Increasing the Blasting Power of Explosive Materials by Means of Cumulative Shock Waves". These papers, which dealt with what is called the Munroe Effect in the United States, were published in the January and February, 1925, issues of Tekhnilia i. Snabzhenie Krasnoe Armii, which is a popular Red Army ordnance journal. On page 16 of the January article are included diagrams of shaped charges in different forms. The effects resulting from detonation are indicated. It must be realized that these articles were published years before the vast technological development of the U. S. S. R., [fol. 137] in the formative years of the Red Army.

Repeated references to shaped charges and their uses appear in the Soviet technical literature. Thus, in 1933 N. A. Sokolov in his text, "Course in the Theory of High Explosives", presented to students methods of calculation of the effects of cumulative charges.

In 1942, G. I. Pokrovsky (in "Directed Action of Charge") gave various practical situations, and indicated the expected increase in explosive force (see also Doklady, Volume 16, P. 106 (1945).)

Extensive work in this field for removal of surface rock has been carried out by the Institute of Mining Affairs of the Academy of Science of Moscow and by the Kirghiz Academy of Science.

Among the more recent text-books in which this subject is discussed are the following:

Dynamics of Explosive Waves, by P. Savich (V. I. A. Moscow 1941).

Basic Calculations of Charges, by G. I. Pokrovsky (Mining Institute, Academy of Science, Moscow).

Experimental Investigations of the Mechanical Action of Shock Waves from Explosions, by Sadovsky (Publishing House, Academy of Sciences, Moscow, 1945).

Basic Dynamics of Explosives, by O. E. Vlasov (Publishing House, Academy of Science, Moscow, 1945).

Much of this practical work was in turn based upon many important developments of theory which occurred in the Soviet Union. To cite a few instances here:

One of the main methods for calculating shock wave interactions the so called Hodo-graph method, was invented by the Russian, S. H. Chaplygin (On Gas jets, Scientific Annals, Univ. of Moscow, Phys-Math Division # 21, Mos-[fol. 138] cow 1904).

The study of shock point interactions for supersonic flow which is very pertinent theory in this field of force waves has been extensively developed in the U. S. S. R. The theory which was worked out internationally developed in stages. First order perturbation theory was developed by Ackeret (Helvetica Phys. Acta (1928). Second order pertubations were developed by the German Buseman, while the third and fourth order theory was developed by A. Donov, Izvestia Akad. Nauk, S.S.R. Ser. Math. 1939).

The great theoretical physicist L. Landau has done extensive work in the fields of solid state theory, general field theory, nuclear physic and on shock waves. His papers on spherical shock waves (Akad. Nauk S.S.R. Fisikalski Zhurnal *6*, 229 (1942) and Akad Nauk S.S.R. Doklady, 44, 139 (1944) are considered outstanding in the United States.

From this brief literature survey it is clear that implosion theory and practice are not new in the U. S. S. R. However, the additional point must be made that there are scientists in the U. S. S. R. who have published outstanding papers in the fundamental chemistry, physics and mathematics of explosions and chain reactions. Thus, Professor C. N. Hinshelwood, F.R.S. of the University of Oxford, himself one of the outstanding authorities in the kinetics of reactions, has the following to say (Nature, Volume 156, page 283 (1945):

"The Institute of Academician Semenov, recently transferred from Leningrad, houses a school of workers who, under the inspiration of their chief, have made one of the most characteristic of the Russian contributions to modern [fol. 139] physical chemistry, namely, the intensive study in all their aspects of the phenomena of flame, combustion and explosions. The work of Semenov on the theory of

branching reaction chains and the interpretation of explosion limits, thermal and non-thermal explosions, degenerate explosions and so on, is too well known to need description. Some of the more recent work has included ingenious studies of the way in which chemical reactions may be initiated upon a solid surface and propagate themselves into the whole volume of the material . . . It would be extremely difficult in a short account to mention individual workers; but perhaps I might remark how illuminating I found the contributions of Zeldovich on the fascinating but extremely difficult problem of the rate of propagation of *g*lame through combustible mixtures. This subject is of the greatest practical importance and of considerable theoretical interest, and the recent contributions maintain the traditions of the Semenov school."

The physical chemist Zeldovich who is referred to by Hinshelwood is the author of several outstanding papers on detonation—viz. Journal of Experimental and Theoretical Physica, U. S. S. R., Volume 12, page 389 (1942) and, with Leipunsky, Journal of Experimental and Theoretical Physics, U. S. S. R., Volume 13, page 181 (1943). In the first paper, Zeldovich reported the study of pressure distribution accompanying a spherical shock wave in chain reactions. In the second paper the authors obtained by the initiation of a chain reaction producting a shock wave, temperatures more than seven times that of the surface of the sun. They described their apparatus in detail.

Parenthetically, it should be noted that the same Zeldovich [fol. 140] (together with J. Khariton) developed the theory of the chain reaction accompanying fission, and made a calculation of the critical mass required. There is also presented the *first* published detailed account of the theory of the pile (Journal of Experimental and Theoretical Physics (U. S. S. R.) Vol. 9, 1425 (1939) and Vol. 10, page 29 (1940). If an explosion expert is simultaneously working on the problem of the chain reaction in uranium as far back as 1940, it is reasonable to expect that several practical methods of achieving atom-bomb detonation will have occurred to him before 1945.

Finally, the mathematical theory which specifically re-

lates to explosion waves must be considered. The specific name for the general branch of mathematics which applies to these processes is non-linear differential equations. The work of the Jukovsky Institute in Moscow has projected Soviet mathematics into a leading world position in this particular field.

IV. Conclusions.

Based upon the preceding documentation the following conclusions may now be drawn:

1) Portions of the testimony of the Government witness Walter S. Koski were not true. The theory of convergent force waves was not discovered and developed at Los Alamos but has been known for more than a century.

2) The essential idea allegedly transmitted by David Greenglass to the U. S. S. R. was the use of explosive lenses to rapidly compress the fissionable metal. This principle also had previously been reduced to practice, and was public knowledge, having been filed as a U. S. patent application in 1941. In addition, R. W. Wood had as early as 1936 [fol. 141] demonstrated that spheres of metal may be made by the compression of sheets or plates of metal with convergent force waves.

3) The use of explosive lenses was a well-developed art in the U. S. S. R. prior to the date of the alleged act and the theory and practical details of this art were widely published in its technical journals.

4) The idea of the detonation of fissionable materials was widely discussed in Soviet scientific journals prior to any of the alleged acts.

5) The "secret" which David Greenglass allegedly transmitted to the U. S. S. R. was no secret at all to any explosive expert.

6) The ability of any country to produce an atomic bomb rests upon its ability to mobilize the hundreds of thousands of scientists, technicians and laborers and its ability to make available the vast industrial plant required. It does not rest on stealing the "secrets" of the United States.

7) The ability of the Government to classify as secret well-known scientific and technological matter has tended to

create dangerous illusions of American discovery and monopoly of knowledge in the field of atomic energy.

In connection with the matter set forth herein above, the petitioners annex, make a part hereof, and mark "Exhibit F", the affidavit of John Desmond Bernal, duly sworn to before a Vice-Consul of the United States in London, England, on November 12, 1952.

Twenty-second: As a matter of law, by reason of the foregoing, no crime was committed and the Court was without jurisdiction to impose the sentence.

[fol. 142] Twenty-third: The petition-rs herein, from the time of their arrest to the present, have at all times insistently asserted their innocence of the crime charged. The evidence upon which they were convicted and sentenced to death—the testimony of accomplices bound together by thin strands of circumstantial evidence—was always suspect.

The matters set forth in this petition establish that the Government abused the processes of justice and unconscionably invaded the fixed rights of these petitioners, to procure their conviction and, ultimately, the sentence forfeiting their lives. The entire proceeding is manifestly a product of fraud and untruth. It writes a dark page in the annals of American jurisprudence, and casts the shadow of Dreyfus over the heritage of American justice.

Twenty-fourth: The petitioners are unjustly, unlawfully and illegally confined in violation of the Fifth and Sixth Amendments to the Constitution of the United States, and the Court was without jurisdiction to impose the aforesaid sentence upon them.

Twenty-fifth: On or about November 21, 1952, Hon. Irving R. Kaufman, the sentencing judge in this proceeding, made and entered an order directing the United States Marshal for the Southern District of New York to execute the sentence imposed by the aforesaid judgment dated April 15, 1951, by executing the petitioners on a day during the week commencing January 12, 1953.

Twenty-sixth: Unless the relief requested herein is granted, the petitioners will suffer irreparable and irrevocable harm.

[fol. 143] Twenty-seventh: No previous application has been made for the relief herein requested.

Wherefore, the petitioners ask the judgment of this Court that an order be made and entered:

1. that the respective sentences of the petitioners be vacated and set aside and the petitioners discharged from detention and imprisonment; or

2. in the alternative, that a hearing upon this petition be granted to determine the issues and make findings of fact and conclusions of law with respect thereto; and upon such findings, to vacate and set aside the respective sentences of the petitioners, and discharge them from detention and imprisonment; and

3. that pending the determination of these proceedings, the United States of America or any agent or agency thereof be stayed from executing these petitioners, pursuant to the judgment dated April 5, 1951 and the order hereinabove referred to, made and entered herein November 21, 1952; and from proceeding in any manner or from taking any steps to or tending to the execution of the aforesaid judgment or order;

and for such other and further relief as to this Court may seem proper.

Emanuel H. Bloch, Attorney for Petitioners.

Dated: November 24, 1952.

[fol. 144] *Duly sworn to by Emanuel H. Bloch. Jurat omitted in printing.*

[fol. 145] EXHIBIT C TO MOTION

GREAT BRITAIN,
England,
County of London, ss:

James Gerald Crowther of 2 Mytre Court Johns Mews John Street W. C. 1. in the County of London England being duly sworn deposes and says:

1. That he is a scientific writer; that he gained an exhibition in Mathematics and Physics at Trinity College in the University of Cambridge; that he is at present engaged

in revising a work on scientific discoveries; that he is the author of 16 books on the history of Science and the social relations of Science including in particular the works known as "Famous American Men of Science" "British Scientists of the Twentieth Century" "The Social Relations of Science" and other works; that various of his books have been translated into French German Spanish Arabic Portugnese and Chinese; that in the year 1928 he was appointed Scientific Correspondent of the newspaper "The Manchester Guardian"; that in the year 1937 at the invitation of the President of Harvard University in the United States of America—Doctor James B. Conant—he delivered at that University a series of six lectures on the History of Science in America; that towards the end of World War I—namely in 1918—he took part in early British research into anti-aircraft gunnery for the Munitions Inventions Department of H. M. Government; that during and after World War 2—namely from the year 1941 to the year 1946—he was Director of the Scientific Department of the British Council which is an official body under the auspices of the British Government and answerable to the British Foreign Office; and that he is a British Subject by birth.

2. That for the purpose of his writings the said James Gerald Crowther has had occasion to interview many scientists—some of great eminence—for the purpose of ascertaining their recollection of certain scientific matters in which they were engaged at a distance of years; that he found sharp divergences of recollection as between one [fol. 146] scientist and another and that his experience in this field of work has especially qualified him to form judgments as to the value and reliability of recollections in scientific matters of any particular individual in any particular circumstances.

3. That he has read a transcript of the testimony of David Greenglass as well as that of Walter Koski and John A. Derry in the case of the United States against Julius Rosenberg and Ethel Rosenberg and that he has noted therefrom the technical and scientific qualifications and background of the said David Greenglass.

4. That it is his opinion that it would have been impossible for the said David Greenglass to have reproduced in

any detail in the years 1950 or 1951 replicas of lens molds sketches last seen by the said David Greenglass five years previously relying solely on memory and without any outside aid or assistance; that it is his opinion that it would have been impossible for the said David Greenglass to have reproduced in any detail in the years 1950 or 1951 replicas of a schematic drawing on an experiment or implosion affects utilizing high explosive lenses together with appropriate descriptive material last seen by the said David Greenglass five years previously relying solely on memory and without any outside aid or assistance; that it is his opinion that it would have been impossible for the said David Greenglass to have reproduced in the years 1950 or 1951 a reliable replica of a sketch of a cross section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such bomb and its component parts the said sketch having been last seen by the said David Greenglass five years previously and the said David Greenglass relying for the reproduction solely on memory and without any outside aid or assistance.

5. That the said James Gerald Crowther having read the transcript of the said testimony of the said David Greenglass is of the opinion that the testimony so far as it relates to the witness' recollection of technical matters taking place five years previously is valueless.

James Gerald Crowther.

Subscribed and sworn to before me this sixth day of November, 1952. Kenneth L. Steward, a Notary Public of London, England. (Seal.)

[fol. 147] GREAT BRITAIN AND NORTHERN IRELAND,
London, England,
Embassy of the United States of America, ss:

I, Edward L. Killham, Vice Consul of the United States of America residing at London, England, do hereby make known and certify to all whom it may concern that

Kenneth Livingston Steward

who has signed the annexed certificate, was in fact a Notary Public at the time the annexed certificate purports

to have been made; that I have compared the signature of said

Kenneth Livingston Steward

upon the original annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen impression thereof filed in this Embassy; and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

In testimony whereof I have hereunto set my hand and affixed my seal of office at London aforesaid this Sixth day of November in the year of our Lord one thousand Nine hundred and fifty-two.

Edward L. Killham, Vice Consul of the United States of America at London, England. (Seal.)

Service No.: 7313.
Fee $2.00 14s.8d.
American Foreign Service $2.00 Fee Stamp.

[fol. 148] EXHIBIT D TO MOTION

GREAT BRITAIN & NORTHERN IRELAND,
County of Lancaster,
City of Manchester,
Consulate of the United States of America, ss:

I, James R. Riddle, Consul of the United States of America residing at Manchester, England, do hereby make known and certify to all to whom it may concern that

William Legh Egerton Egerton-Smith

who has signed the annexed certificate was in fact a Notary Public at the time the annexed certificate purports to have been made, and that I have compared the signature of the said

William Legh Egerton Egerton-Smith

upon the original annexed certificate with a specimen of his signature filed in this Consulate; that I believe his

signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen impression thereof filed in this Consulate; and that I believe the impression of the seal upon the said annexed original certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Manchester aforesaid, this 10th day of November, 1952.

James R. Riddle, Consul of the United States of America at Manchester, England. (Seal.)

Fee $2.00 equal to 15s.8d.
Service No. 1984.
American Foreign Service $2.00 Fee Stamp.

[fol. 149] To all to whom these presents shall come I, William Legh Egerton Egerton-Smith, Notary Public, duly authorized, admitted and sworn, and practising in Manchester, in the County of Lancaster, in the United Kingdom of Great Britain and Northern Ireland, do hereby certify that I was present on the tenth day of November instant and did see Thomas Reeve Kaiser duly sign the paper writing or Affidavit hereunto annexed that the name "T. R. Kaiser" thereto subscribed is of the proper handwriting of the said Thomas Reeve Kaiser that the name "W. L. E. Egerton-Smith" thereto subscribed is of the proper handwriting of me the Subscriber and I do also certify that the Affidavit was properly sworn before me in accordance with and is legally effective and valid according to the laws of England.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office this tenth day of November in the year of our Lord 1952.

W. L. E. Egerton-Smith, Notary Public, Manchester, England. (Seal.)

[fol. 150] AFFIDAVIT OF THOMAS REEVE KAISER IN SUPPORT OF MOTION

Re: Julius Rosenberg and Ethel Rosenberg

Affidavit by Thomas Reeve Kaiser sworn at Manchester England on the Tenth day of November 1952.

I Thomas Reeve Kaiser Research Fellow in the University of Manchester England make oath and say as follows:

1. I hold the following qualifications:—

Bachelor of Science (First Class Honours);
Master of Science (First Class Honours) each in the University of Melbourne.
Doctor of Philosophy in the University of Oxford.
Associate of the Institute of Physics (Great Britain).

2. My experience is as follows:—

Since graduating in 1943 from the University of Melbourne I have been engaged in full time research in various fields of Physics. During the recent war and until the middle of 1947 I was employed by The C.S.I.R. Radiophysics Laboratory, Sydney, Australia. Initially my work was in the field of Radar Counter Measures and subsequent to 1944 I was in charge of research on and development of Radar Aerials. I went to Clarendon Laboratory Oxford University in 1947 and there worked in the Nuclear Physics group, being particularly concerned with the theory and practice of the acceleration of particles to high energies. In October 1950 I was appointed a Research Fellow at the Manchester University.

My contribution in the above fields of Physics include joint authorship of "A Text Book of Radar" (Chapman and Hall, 1948) and various papers dealing with theoretical and experimental aspects of Nuclear Physics and Radio Astronomy.

3. I have read the transcript of the testimony of David Greenglass, of Walter Koski and John A. Derry upon the trial of Julius Rosenberg and Ethel Rosenberg. The portions of such transcript read by me are now produced and shown to me marked TRK 1 TRK 2 and TRK 3 and annexed hereto.

4. I have been asked to provide answers to nine questions. In the following paragraphs I set out the said questions and my answer- thereto.

[fol. 151] 5. *Question 1.* Could a person of Greenglass's background and experience have produced drawing solely from memory in 1944 and 1945 sketches of the lens molds he allegedly turned over to Rosenberg (and Gold)?

Answer 1. It is conceivable that in 1944 and 1945 the said David Greenglass could have reproduced from memory sketches of simple pieces of equipment which he had constructed, or was in the process of constructing, in his capacity as a machinist.

6. *Question 2.* Could a person of Greenglass's background and experience have produced in 1950 and 1951 replicas of the sketches of the lens mold he allegedly turned over to Rosenberg (and Gold) in 1944 and 1945 drawing solely from memory and without any outside aid or assistance or coaching?

Answer 2. It is improbable that the said David Greenglass could reproduce, in any detail, such sketches after a lapse of five or six years and relying solely on his unaided memory.

7. *Question 3.* Could you, as a trained scientist, drawing solely from memory, produce a replica of the sketch of the lens mold five or six years subsequent to having terminated work or other connection with such a problem?

Answer 3. I have considered this question in relation to my own researches. While I could without difficulty produce sketches outlining the principles involved in developments in which I participated some five or six years ago I could not do more than this without reference to notes made at the time. For example, without reference to such notes I could not make detailed drawings of specific equipments. I certainly could not, without reference to notes, make a replica of the sketches of any specific apparatus.

8. *Question 4.* Could a person of Greenglass's background and experience have produced in 1945 drawing solely from memory and without any aid or assistance from any person or technical or scientific source a schematic drawing of an experiment on implosion effects utilizing high explosive lenses, plus appropriate descriptive material

(described by Greenglass as showing "a schematic view of the lens mold set up in an experiment")?

[fol. 152] *Answer 4.* It is possible that any person working in or visiting a scientific laboratory could reproduce sketches and written material describing his impressions of the apparatus and experiments. Having had the experience of reading newspaper articles dealing with scientific work, written by non-scientific reporters after a visit to a laboratory, I am emphatic in saying that such material could only be accurate and of any value if the person concerned was scientifically trained in the appropriate field of science.

9. *Question 5.* Could a person of Greenglass's background and experience have produced in 1950 or 1951 replicas of the sketches of the schematic drawing mentioned in "4" above which he allegedly turned over to Gold in 1945, drawn solely from memory and without any outside aid or assistance or coaching?

Answer 5. It is improbable that the said David Greenglass could reproduce in any detail such sketches after a lapse of five or six years and relying solely on his unaided memory.

10. *Question 6.* Could you, as a trained scientist, drawing solely from memory, produce the replica of a sketch of such a schematic drawing, five or six years subsequent to having terminated work or other connection with a technical problem of such complexity?

Answer 6. I make the same answer to this question as to Question 3.

11. *Question 7.* Could a person of Greenglass's background and experience have produced in 1945 a sketch of a cross-section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such a bomb and its component parts, drawing solely from memory and without the aid or assistance of any person or written matter or technical or scientific source of coaching?

Answer 7. The material (drawings and written) referred to in this question and in Question 8 is considerably more extensive than that referred to in the earlier questions. It is inconceivable that a man in the position of the said

David Greenglass, without specialist training and experience, could have accomplished this feat in 1945.

[fol. 153] *Question 8.* Could a person of Greenglass's background and experience have produced in 1951 a replica of the sketch of a cross-section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such bomb and its component parts, drawing solely from memory and without the aid or assistance of any person or written matter or help from any technical or scientific sources of coaching?

Answer 8. I repeat my answer to the previous question and say that it is likewise inconceivable that the said David Greenglass could have reproduced the matter in question in 1951 without the aid or assistance of any person or written matter or help from any technical or scientific sources.

13. *Question 9.* Could you, as a trained scientist, produce a sketch of a cross-section of this type of atom bomb together with the appropriate explanatory matter, drawing solely from memory alone five or six years subsequent to having terminated work or any connection with a technical problem of such complexity?

Answer 9. In answer to this question I repeat my answer to Question 3, extending my answer to Question 3 to apply to written matter as well as to drawings.

Sworn at Manchester in the County of Lancaster, England, this tenth day of November, 1952.

T. R. Kaiser.

Before me, W. L. E. Egerton-Smith, Notary Public.

[fol. 154] EXHIBIT "E" TO MOTION

REPUBLIC OF FRANCE, CITY OF PARIS,
Embassy of the United States of America:

Before me of the United States of America, duly commissioned and qualified, personally came Jacques S. Hadamard, of 12, rue Emile Faguet, Paris (France), who, being duly sworn, deposes and says:

I am a Ph.D. in sciences, Paris University. I have been a professor of Mathematics at the College de France (Paris

University) from 1897 to 1935 and am still an honorary professor thereof. I have been a professor of Mathematics at the Ecole Polytechnique of Paris from 1912 to 1935 and am still an honorary professor thereof. I am a member of the French Academy of Sciences. Great-Officer of the Legion of Honor. Moreover I am LLD Yale 1901, Member of the National Academy of Sciences of Washington (D.C.), Member of the American Academy of Sciences, Boston (Mass.), Member of the National Academy of Political Science (U.S.A.). I was also elected Honorary Chairman of the International Congress of Mathematics of Boston in 1950. I also belong to numerous other foreign scientific bodies, including the Royal Society (London).

I resided in the United States from 1941 to 1944 and have visited there many times before and after this period. I have always been closely connected with scientific, educational and research circles and can judge of Greenglass' competency in scientific matters from his educational record.

I have read the transcript photographically reproduced of the testimony of David Greenglass, as well as that of Walter Koski and John A. Derry.

In the light of the above transcript and of my knowledge of scientific matters, I state as follows:

> From what I know of Greenglass' background, it seems to me highly improbable that he could have reproduced in any detail replicas of lens molds sketches after a lapse of five years, relying solely on his unaided memory.
>
> For the same reasons, it seems all the more improbable to me that he could have reproduced, in detail, replicas of schematic sketches of lens molds after a lapse of five years, relying solely on his unaided memory.
>
> It is inconceivable that Greenglass could have reproduced replicas of a cross section of the Nagasaki type of bomb plus explanatory matter after a lapse of five or six years, relying solely on his unaided memory. It is more inconceivable still that Greenglass could have given lengthy and detailed explanations not only on the component parts of the bomb, but also on their

functions and workings; all he could not have any idea [fol. 155] of and which nobody is alleged to have given him even an idea.

Jacques S. Hadamard.

Subscribed and sworn to before me this 7th day of November, 1952. Edith A. Stensby, Vice-Consul of the United States of America, at Paris, France. (Seal.)

Service No. 6917. Tariff Item No. 24. $2.00 Fr. Frs. 720.
American Foreign Service $2.00.
Fee Stamp.

[fol. 156] EXHIBIT F TO MOTION

GREAT BRITAIN, ENGLAND,
County and City of London, ss:

John Desmond Bernal of 21 Torrington Square, London W.C. 1, England, Professor of Physics, being duly sworn deposes and says as follows:

1. That he is Professor of Physics at Birkbeck College, University of London and had experience of the theory and practice of explosives in his capacity as Scientific Advisor to the Ministry of Home Security, 1939-1942, and to Combined Operations, 1942-1945.

2. That he has read the records contained in a transcript of the evidence given by David Greenglass on the 9th and 12th of March, 1951, in the case of Julius Rosenberg and Ethel Rosenberg vs. The United States of America and, also of the evidence given on 12th March 1951 by Walter S. Koski in the said case, and, in particular, with regard to the exhibits (2), (6) and (7) presented in the said case.

3. That, in his opinion, as a scientist with special knowledge of the physics of explosives, on the bases of the description of the said exhibits contained in the said records (i) notwithstanding the opinion of Walter S. Koski in his evidence (ff. 673 and 679 of the said transcript) the lenses which the said exhibits (2), (6) and (7) purport to represent do not involve the use of a new and original principle and (ii) notwithstanding the opinion of the said Walter S.

Koski in his evidence (f. 672 of the said transcript) knowledge of the said lenses would not be of substantial advantage to a foreign nation.

4. That he bases his opinion expressed in paragraph 3(i) aforesaid on the following grounds—

> The principle of the converging shock wave is not a new one. It has been utilized in practice as the hollow charge effect as far back as 1792. It was rediscovered by Admiral Munroe of the United States Navy in 1888, is known as the Munroe effect and was widely publicized at that time and later, for example by Munroe himself in
>
> i. Scribner's Magazine, 1888, *3*, 563-576.
> ii. Executive Document No. 20, 53rd Congress, 1st Session, 1894.
> iii. Popular Science Monthly, 1900, *56*, 453-454.
>
> It was also known in other countries. A patent—
>
> Brit. Patent 28,030, 1911. Westfallisch-Aanhaltische Sprengstoff A. G. Improvements in explosive charges or bodies.

was taken out in 1911 by Neumann and the effect was described in standard books on explosives—

> iv. Colver, E., High explosives, 1918, pp. 490-493.
> v. Stettbacher, A. Schiess and Sprengstoffe, 1st edition, 1919, pp. 36-37; 2nd edition, 1933, pp. 51-52.
> vi. Marshall, A. Explosives, Vol. 3, 1932, p. 169-170.
>
> It was extensively used by all belligerents in the last war and was the basis of the tank destroying effi- [fol. 157] cacy of the well-known "bazooka".
>
> The principle underlying all these applications is the physical principle that a wave of any type increases in amplitude when it converges and this means, in the case of an explosive shock wave, a corresponding increase in velocity and pressure. The theory of this effect in the particular case of a conical lined hollow charge has been published in the Journal of Applied Physics, Vol. 19, pp. 563-582, 1948. It is clear from the verbal descriptions given in evidence at the trial,

see especially ff. 597, 614-620, 646-655, that the lenses, the moulds of which are alleged to have been made by David Greenglass, are essentially shaped charges employing this well-known principle of convergence. There is no indication of any new principle being involved.

5. That he bases his opinion expressed in paragraph 3(ii) aforesaid on the following grounds—

(a) The particular importance of the devices, drawings of which are alleged to have been handed over by David Greenglass, resides, in his opinion, more in the principle involved, which as stated in paragraph 4 aforesaid he maintains is not new and original, than in the particular shapes and relative dimensions of the charges. It is not disputed that experimental development work such as that carried out by the said Walter S. Koski was necessary to find the shape most adapted to the compaction of the fissile material, but such work could have been carried out by any explosives expert and it is reasonable to suppose that not only one but a number of solutions could be found for providing an adequate implosion. Further as is stated in the said Walter S. Koski's evidence (f. 600 of the said transcript) the efficacy of the lenses depended on "a combination of explosives having different velocities of detonation". This combination was made at an establishment remote from that at which David Greenglass worked and he nowhere claims to be aware of its nature. Without it any information on the mere shape of the lenses which he alleges to have transmitted would be of negligible value. It is, therefore, evident that any advantage to any foreign nation by the divulging of the design of any particular lens would be non-existent or very small as they already would have high explosive lenses of a suitable type or could readily develop them on the basis of existing knowledge.

(b) It might be argued that even if there were nothing essentially new in the design of the high explosive lenses and their implosive effect, it was still a matter of the utmost importance that the idea of using this principle for the rapid reduction of the volume of a piece or pieces of fissionable material to the critical volume be considered a secret

of the highest order. To maintain this, it is necessary to assume a degree of technical incompetence on the part of a foreign nation which, if it existed, would have prevented them in any case from being able to utilize the information on atomic weapons. Already by 1939, the principles of nuclear fission, the neutron chain reaction and the concept of the critical volume were well known in scientific circles. Once the possibility of producing fissionable material in adequate quantity for the critical volume was realized, it was obvious that a bomb could be made if the critical volume. [fol. 158] could be produced sufficiently rapidly to prevent the blowing off of the material before the chain reaction could proceed far enough. Only a ballistic or an explosive compression could produce such a rapid reduction in volume. The use of a hollow charge for this purpose would be the first to occur to any explosives expert if faced with the problem. Any real value to a foreign nation of information on the construction of a bomb or bombs model would therefore reside primarily in the absolute scale, for this would reveal the critical volume aimed at and it is not contended by the prosecution that David Greenglass ever obtained such information.

(c) Exhibits (2), (6) and (7), as produced in Court, are not claimed to be the actual sketches transmitted by David Greenglass to Julius Rosenberg or Harry Gold. They are drawings, admittedly made five years after the event, of sketches not copied but made from memory from actual models. While not maintaining that it is impossible to reproduce a drawing at such an interval of time it is difficult to understand how such drawings can be acceptable as reliable in view of the fact that in the interval between August 1945 and June 1950 when David Greenglass was arrested much publicity had been given to the atom bomb and the principles of its working, including the means of achieving a critical mass, and the recollection of what he had seen and learned may be considered to have influenced, even if unconsciously, David Greenglass's recollections. Further, in the interval between his arrest in June, 1950, and the time of the trial in March, 1951, he had been interrogated several times on the subject of his alleged espionage and it

is difficult to see how his memory could not have been influenced by the questions put to him in that interval.

John Desmond Bernal.

Subscribed and sworn to at 5 1/2, Chancery Lane in the County of London, England, the 10th day of November 1952, before me. Kenneth L. Steward, A Notary Public of London, England. (Seal.)

[fol. 159] Great Britain and Northern Ireland,
London, England,
Embassy of the United States of America, ss:

I, Edward L. Killham, Vice Consul of the United States of America residing at London, England, do hereby make known and certify to all whom it may concern that

Kenneth Livingston Steward

who has signed the annexed certificate, was in fact a Notary Public at the time the annexed certificate purports to have been made; that I have compared the signature of said

Kenneth Livingston Steward

upon the original annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen impression thereof filed in this Embassy; and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

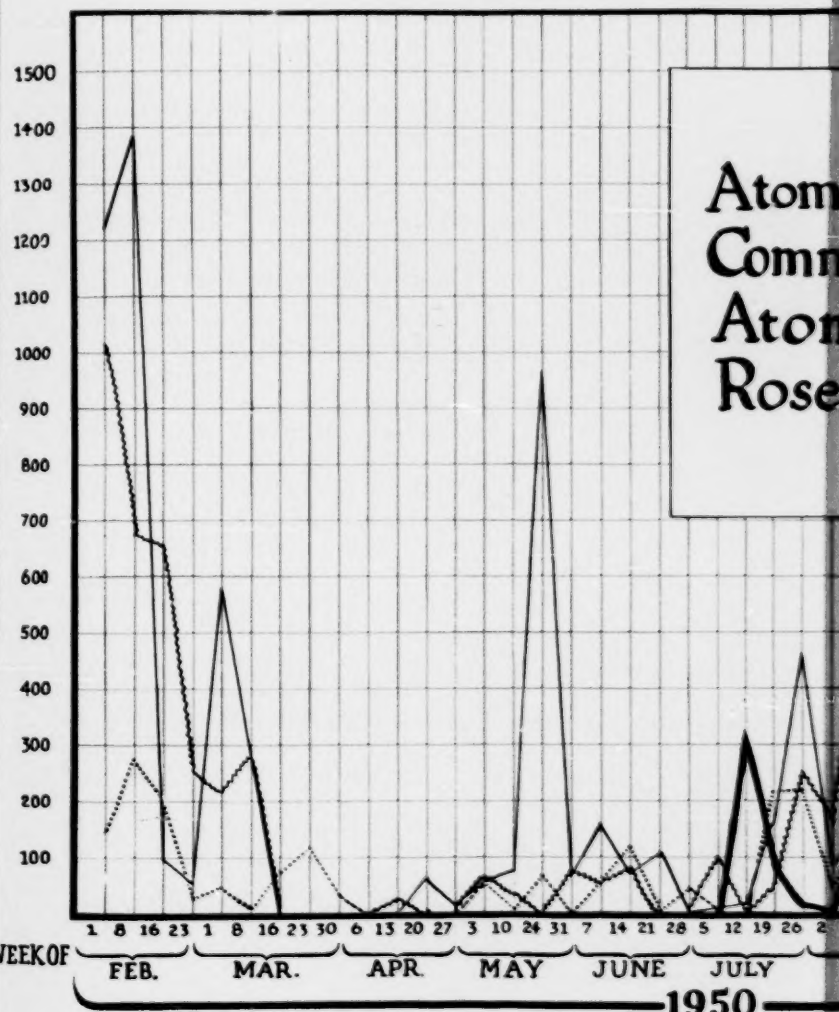
In Testimony Whereof I have hereunto set my hand and affixed my seal of office at London aforesaid this Twelfth day of November in the year of our Lord one thousand nine hundred and fifty-two.

Edward L. Killham, Vice Consul of the United States of America at London, England. (Seal.)

Service No. 7469.
Fee $2.00—14s.8d.
American Foreign Service $2.00 Fee Stamp.

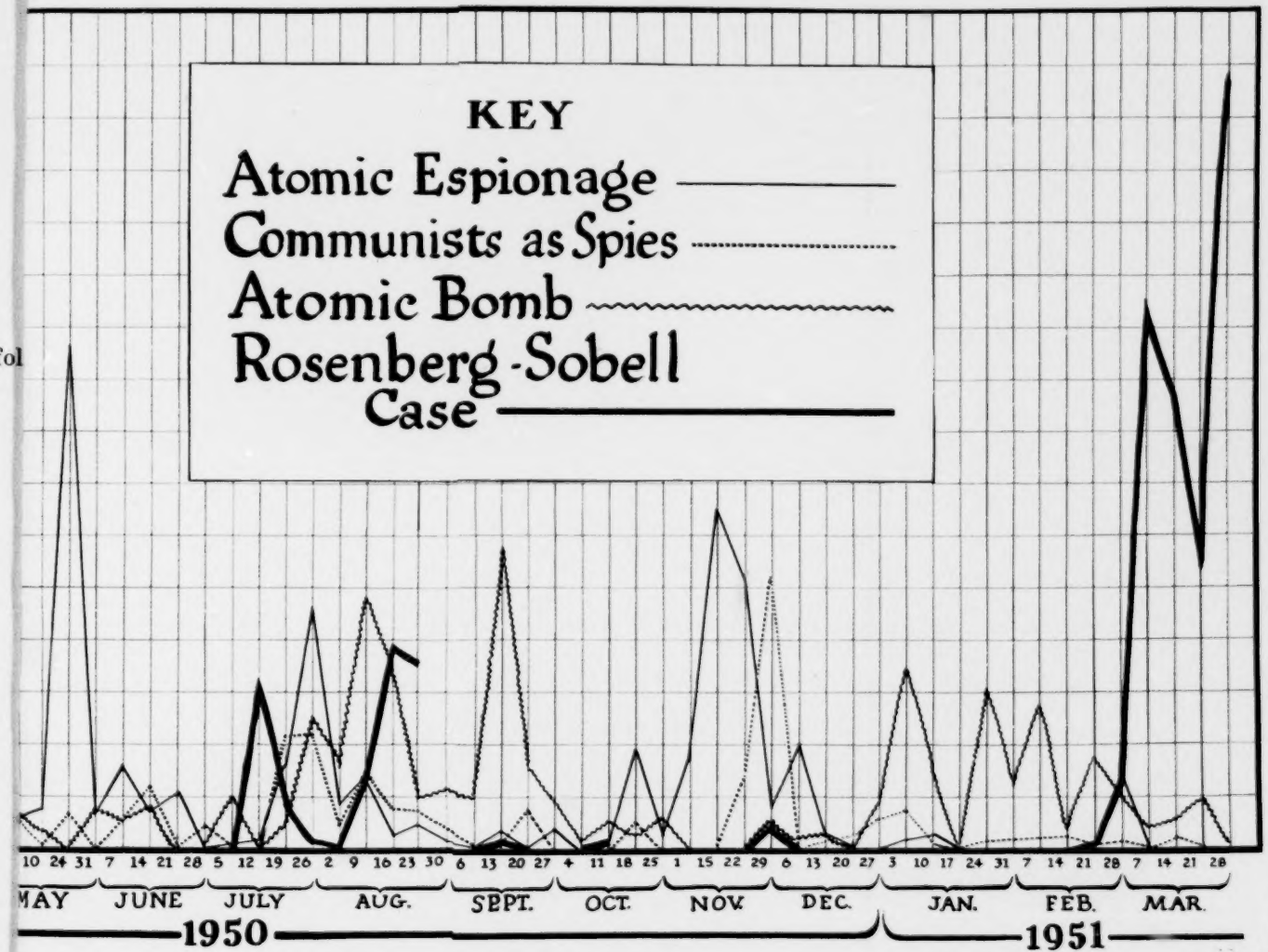
(Here follows 1 photo., folio 160)

QUANTITATI
Feb. 1, 1950



NTITATIVE REPORTAGE
eb. 1, 1950 *to* April, 3, 1951

(Here fol



[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—ROSENBERG CASE

On the annexed petition of Julius Rosenberg and Ethel Rosenberg, by Emanuel H. Bloch, their attorney, duly verified on the 24th day of November, 1952, and upon the indictment herein, and upon all the other papers and proceedings herein, Let the United States of America, or its attorneys, show cause before the Criminal Part of this Court, to be held in the Courthouse thereof, at Foley Square, in the Borough of Manhattan, City and State of New York, on the 26th day of November, 1952, at 10:30 o'clock in the noon of that day, or as soon thereafter as counsel can be heard, Why an order should not be made and entered herein:

(1) vacating and setting aside the respective sentences of the petitioners and discharging them from detention and imprisonment; or

(2) in the alternative, granting a hearing on the petition herein to determine the issues and make findings of fact and conclusions of law, and upon such findings and conclusions, vacating and setting aside the respective sentences of the petitioners and discharging them from detention and imprisonment; and

(3) pending the determination of these proceedings, staying the United States of America, and any agency or agent thereof, from executing these petitioners, pursuant to the judgment herein, dated April 5, 1951, and the order of this Court, dated November 21, 1952; and from proceeding [fol. 162] in any manner, or from taking any steps to, or tending to, the execution of the aforesaid order; and for such other and further relief as to this Court may seem proper;

Application for ex parte stay is denied without prejudice to further application by petitioners.

Dated: New York, New York, November, 1952.

Edward Weinfeld, U. S. D. J.

[fol. 163] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MYLES J. LANE IN OPPOSITION TO MOTION (ROSENBERGS)—December 1, 1952

Myles J. Lane, being duly sworn, deposes and says:

I am the United States Attorney for the Southern District of New York and, as such, am familiar with the facts and circumstances relating to the above-entitled prosecution. This affidavit is submitted in opposition to the motion brought on by the defendants Julius and Ethel Rosenberg purportedly under Section 2255, Title 28, United States Code.

A perusal of the moving petition signed by the attorney for the Rosenbergs makes it patent beyond question that the instant application is absolutely devoid of merit, and that nothing is raised in the motion papers which is worthy of consideration by the Court under Section 2255, Title 28, United States Code, as a matter of law the moving papers, on their face, and when considered in conjunction with the trial, and appellate records in this case, are insufficient, present no grounds for relief, and no factual matters for a hearing. Stripped of the many irrelevant and bombastic statements they contain, the moving papers themselves demonstrate that the instant application is nothing more than a dilatory effort to forestall the execution of the sen-[fol. 164] tences which were justly and lawfully imposed upon the defendants.

The three grounds of attack urged by all the defendants in this motion are, in essence, as follows:

I. Newspaper publicity prior to and during the trial created a "hostile atmosphere" so that the defendants were not afforded a fair trial within the meaning of the Constitution.

II. The prosecution knowingly used false testimony; and

III. The information transmitted by the defendants to agents of the Soviet Union was not secret.

In the succeeding paragraphs of this affidavit, I shall deal with these alleged grounds of attack seriatim.

I

The defendants have amassed extensive exhibits containing copies of newspaper articles published during the year preceding their trial dealing with Communists, atomic warfare, spies, and their own arrest, pre-trial and trial proceedings. Adding the lineage and headlines on all these subjects, and treating each as a personal attack upon themselves, they argue that this pre-trial and trial newspaper publicity affected the minds of the community to such an extent that the defendants were unable to secure an impartial jury and a fair trial. This, they contend, is a violation of the Fifth and Sixth Amendments and will ground a motion under Section 2255. An examination of the pre-trial and*d* trial tactics of the defendants reveals the true and frivolous character of this contention. It may *be* reasonably be assumed that the astute counsel for the defendants, and*d* the defendants themselves, read the newspapers prior to the trial as they were part of the community [fol. 165] in which the alleged hostility was engendered. This would include the defendant Sobell, whose flight to Mexico indicated he was well-informed of the trend of events. With an awareness of the newspaper coverage, defendants Rosenbergs' counsel stated that he desired a speedy trial of his clients. (Defendants Exhibit VII-C-2). This also i*n* an important constitutional guarantee, and I can only conjecture that had there been a long delay, the defendants would be relying upon that delay as a basis for a motion. For during the entire trial there was no request for a continuance, or for a change of v*a*nue.

When this case was called for trial, counsel for th fendants clearly stated on the record that "the defenda... were ready to proceed". (R. 36) * No application for adjournment was made, and no statement that the pre-trial newspaper coverage given this case was such as to preclude the impanelling of an impartial jury. At the outset an opportunity to raise*e* this question was afforded the defendants. The trial court's questioning on the voir dire was directed, in part, to any predisposition on the part

* "R" refers to the printed record filed by the defendants as Exhibit A.

of the jurors based upon anything they had read or heard concerning the case.

The trial record discloses this specific question by the District Judge:

> "Has any one of you read anything in any newspaper or other publication or heard anything on radio or television about this case?"

After asking that question, the trial court specifically probed the minds of the jurors with regard to the pre-trial newspaper publicity, to determine whether each of them could fairly and impartially hear the *evidence* to be pre- [fol. 166] sented in the courtroom and base his or her verdict solely upon such evidence. The record further discloses that certain prospective jurors asked to be excused from service on this case because they might be influenced by what they read. A reading of the questioning of voir dire (reference to which is respectfully made here), clearly shows that the jurors selected could and did have an open mind concerning this case at the time they were impanelled. The defendants made no suggestion to the contrary. The defendants waived their last peremptory challenge and stated that the jury was "satisfactory to the defendants" and "satisfactory all around". (R. 152) At no time did the defendants intimate that they believed that they were to be tried by a hostile jury.

Not only are the statements in the moving papers that no jury could have escaped the newspaper publicity influence in arriving at its verdict pure speculation, but the sstatement that the jury's verdict was without "content of fairness or reasoned deliberation", is belied by the record. The jurors were cautioned not to read about or listen to reports about the case. The jury deliberated from 4:53 P. M. on March 28, 1951 until 11 A. M. on March 29th, with appropriate respites. Counsel for the Rosenbergs at the trial who, incidentally, is the very same counsel, making the moving petition on the instant application, stated in open court after the jury had returned its verdict of guilty as to each of the defendants as follows:

> "(A) lawyer does not always win a case; all that a lawyer expects is a jury to decide the case on the

evidence with mature deliberation. I feel satisfied by reason of the length of time that you took for your deliberations, as well as the questions asked during the course of your deliberations that you examined very carefully the evidence and came to a certain conclusion." (R. 1583)

[fol. 167] The Rosenbergs' counsel, on summation, stated:

"(W) a feel that the trial has been conducted and we hope we have contributed our share with that dignity and decorum that befits an American trial." (R. 1453)

Trial counsel for Sobell stated:

"I do want to thank the jury as your Honor did for the patience and care with which they sat in this case." (R. 1583)

Defendants had all the material they now rely upon available to them at their trial. They deliberately chose a different course than they now pursue. It is well-settled that Section 2255 is not a device to allow defendants to gamble on tactics.

It had been established in this circuit, before the case of *United States* v. *Delancy*, relied upon by the defendants and before the trial of the instant case, that a hostile community is a basis for a continuance or a change of venue. The proper cases are cited in the memorandum of law submitted with this affidavit. It was, of course, incumbent upon the defendants to request such a continuance or change of venue. The defendants found the venue and the timing satisfactory to them as is shown by their statements at the time of the trial. There is no suggestion, nor could there be, that the trial was conducted in an atmosphere which precluded the defendants from making such motions or request as they believed necessary to preserve their rights. The lengthy record is replete with motions and requests by the defendants with regards to other aspects of the case. Under these circumstances, the law is clear that the allegations with regard to newspaper coverage are insufficient under Section 2255. Even taking them as true, which can hardly be done in view of the record of the trial, they do not estab-

[fol. 168] lish that the defendant was deprived of a fair trial, nor do they establish that defendants could not fully protect their rights at the trial, and raise these very same matters on appeal if they believed that erroneous rulings had been made. Section 2255 is not a substitute for appeal just as it is not an opportunity to retry a case that has been tried under standards comporting with due process.

Here, there was no public hearing after indictment, and no parade of witnesses prior to trial, such as that which the Court of Appeals for the First Circuit, in the *Delaney* case, relied upon in holding that a refusal to grant a continuance was an abuse of discretion.

Apart from this, *there is absolutely no evidence* now before the Court that would warrant any inference to the effect that the jury which convicted these defendants was affected by any so-called hysteria. The statement in the moving papers that hysteria was "artificially induced" is so devoid of factual foundation as to require no reply. Routine statements to the press or answers to press inquiries provide no basis for the argument that the United States deliberately tried its case in the newspapers.

And surely the fact that the arrest and prosecution of persons in the United States on charges of espionage or conspiracy to commit espionage in time of war was followed by the press, cannot serve, of itself, to invalidate convictions lawfully obtained. Press coverage of cases involving the national interest is not only to be expected, but necessary in a democractic way of life. Indeed, any attempt by the prosecution to interfere with the freedom of the press in reporting the public details of the prosecution of war-time spies would be unwarranted and intolerable under the Constitution and Laws of this country.

[fol. 169] Such statements as those contained on page 15 of the moving petition, scarcely require comment when they are viewed in the light of the trial record. Not only were the defendants not named in the articles cited, but had they been, it would have comported with the proof at the trial. Although Harry Gold in his trial testimony did not state that he knew the Rosenbergs directly, nevertheless he forged an unbreakable link between the Rosenbergs and the Russian superiors of Gold, and, certainly, with Russian espionage.

The statement on page 28 of the moving petition concerning an alleged attempt to establish to the public that adherence to communism would lead communists to commit espionage, sabotage or other treasonable activities, likewise pales into insignificance when considered against the trial testimony. Again, the articles were not written about the defendants, and again, had they been it would have been no more than has been proved. That very fact was established clearly and in incontradicted testimony at the trial. Similarly, while the publicity concerning the prosecution of Brothman and Moskowitz to the effect that they were introduced to espionage through the communist party did not name or suggest these defendants, the trial testimony established that Julius Rosenberg, through his own asmissions to government witnesses, stated that he, too, was able to engage in his espionage activities through contacts he made in the communist party. The bulk of the articles cited by these defendants in no way refer to them. Those in which they are named go no further than the trial proof, and usually not as far.

Allegations that information was "fed to" the press by the prosecution to inspire a press campaign against these defendants, as well as allegations that "all of the prosecution evidence" was revealed to the press, are categorically [fol. 170] denied. Equally untrue is the assertion on page 46 of the moving petition that Rosenberg was already in custody before Sobell fled the country. Defendants' affidavits, which cannot be supported by facts, rest upon distortions. The trial testimony established that Sobell fled shortly after the apprehension of David Greenglass in a manner that paralleled the instructions given by Rosenberg to Greenglass, and that Rosenberg was not apprehended until approximately one month later.

To summarize, there is nothing stated in the present motion as to evidence allegedly given to the press, which was not introduced at the trial. Thus, the jury had the entire story for themselves from the prosecutions witnesses. The prosecuting official did not cause or stimulate "massive pre-trial publicity". Most of the articles cited do not pertain to the defendants. Defendants' own chart showing newspaper lineage in inches demonstrates that between September 1, 1950 and February 28, 1951, one week before the

trial, there was very little space devoted to the defendants, and on most days none at all. Only as the trial commenced, was coverage extensive. This could hardly be a calculated publicity campaign against the defendants. Any case involving the national interest will be covered to some degree by the press. The most significant point to the instant motion is that all the facts alleged in this regard were known to the defendants and their counsel at and prior to the commencement of the trial. Yet they saw fit to raise no question as to the availability of an impartial jury in an atmosphere designed to afford a fair trial. They expressed their satisfaction with the jury and made no motion for a continuance, a change of venue, or a mistrial on these grounds. Since, at best, the most to which they would have been entitled would have been such relief, the failure to seek such relief precludes them from now raising the question. [fol. 171] The attempt to raise a question as to the propriety of the arrest and indictment of William Perl is a clear manifestation of the paucity of material upon which the defendants based this motion. Certainly the trial of one case does not put the processes of the administration of justice into a limbo of inaction so that other criminals cannot be prosecuted at the same time. The insignificance of the indictment of Perl on the trial of these defendants is obvious. Indeed, the news of the arrest and indictment broke at the time when Mrs. Ruth Greenglass was on the witness stand giving damning testimony against these defendants. That the news of the prosecution of Perl affected the trial of these defendants is without basis or support in the record, Defense counsel were unquestionably aware of the newspaper coverage given to the Perl indictment at the time of the trial. As has been noted, they made no motion with respect to such publicity. If they in fact believed that it caused them the damage which they now allege, surely a motion for a mistrial at the time would have been in order. Such a motion, if denied, would have been reviewable upon appeal. The defendants refused to take that tactic at the trial, and cannot now make the Perl publicity a basis for a new trial.

The jury in this case had been instructed on innumerable occasions not to read anything in the newspapers concerning the case. There is no showing or even an intima-

tion that any juror did not abide by this admonition of the Court. Thus, there is no showing that any juror was even aware during the trial of the publicity concerning Perl. [fol. 172] Certainly had the defendants feared any adverse effect from such publicity, it was incumbent upon them to move for a mistrial or request the trial court to charge the jury to disregard such publicity. Had the trial court declined the requested instruction, its action could be reviewed only by the appellate courts, and is not ground for attacking the judgment under Section 2255. Again, failure to raise the point before the trial court would preclude its being raised at this time.

The moving papers on this motion raise a great complaint as to the cross examination of the defendant Rosenberg concerning his knowledge of or acquaintance with Perl. Certainly any objection to such cross examination was required to be raised upon the appeal from the judgment of conviction, and does not subject the judgment to collateral attack.

The allegations that the Perl indictment was procured during the instant trial for the calculated purpose of prejudicing the defendants is without factual basis, and the affidavits attached hereto show the falsity of this claim. The Perl indictment was obtained within a week after Perl had admitted that he had not been truthful to the Grand Jury. It was unsealed the day after it was filed, when it had been ascertained that Perl could be promptly apprehended and there was no danger of flight at that moment. The snide insinuations in the moving papers that there was something irregular about the unsealing of the indictment against Perl are clearly set at rest by the affidavit of David Sweeney, a clerk in the Criminal Calendar Part of this Court for the past 20 years, who states that the procedure was not in any way unusual.

[fol. 173] II

The second ground of attack is alleged fraud by the Government in that it used known perjurious testimony to convict the defendants. The first such allegation concerns the confession of David Greenglass. All the facts concerning the Greenglass confession were known to the defendants at

the time they appealed from the judgments of conviction. Indeed, the testimony and statements from the record contained in the moving papers are taken directly from the record on appeal. The argument now being made was urged in the briefs submitted to the appellate courts and rejected by them. Moreover, defendants had opportunity at the trial to request the Trial Court to examine Greenglass' first statement for inconsistencies, but they did not cho-se to do so. Nor have the defendants come forth with any evidence that Greenglass lied. Moreover, the testimony in issue was elicited by the Court during cross-examination by the defendant. Thus, not only was it not perjury, but it was not testimony used by the Government.

The trial testimony of Greenglass is not at all in conflict with the statements made by Mr. Rogge or Mr. Saypol. Greenglass testified that he cooperated with the Government from the first time he was brought in for questioning. The statement made by Mr. Saypol that protestations of innocence were made by Mr. Rogge at the arraignment of [fol. 174] Greenglass does not in any way contradict the testimony. Similarly, the statement that after representation by counsel came the disclosure of the facts by *both* David and Ruth Greenglass likewise does not indicate that David Greenglass had not cooperated previously. There just is no inconsistency to be found between the testimony and the statements at the time of sentence.

The statements made upon information and belief on pages 63-64 of the moving petition are all on subjects about which the Greenglasses were closely cross-examined at the trial. There is nothing therein alleged which is shown or even alleged to have come to the defendants' attention subsequent to the trial. Mr. Rogge's secretary was a witness at the trial, and Mr. Rogge was available, and even in the court room from time to time during the trial. Had the defendants or their counsel seriously believed the facts now urged, the appropriate forum for their disclosure would have been before the trial court and jury.

To set the record straight, there is submitted herewith the affidavits of John Lewis and Leo Frutkin, Special Agents of the Federal Bureau of Investigation which establish clearly and conclusively that Greenglass was truthful in his testimony.

Certainly, there was no suppression of the truth, and most certainly not with consent and acquiescence of the [fol. 175] prosecuting officials. With regard to the alleged "concealment of coached evidence", the scientific opinions offered to establish this point fall far short of the desired target. Mere "improbability" in the "expert's" opinion does not even raise a question of the truth of Greenglass' testimony that he drew the sketches from memory. A closer scrutiny of the "expert's" qualifications and familiarity with the subject of the testimony at the trial leaves much to be desired. It must be noted that the "experts" could not have observed Ex. 8, the cross section sketch of the atom bomb nor the descriptive testimony relating thereto, as this was ordered impounded by the trial court. Furthermore, there is no showing that any of the "experts" saw any of the exhibits involved. The affidavits of Lewis and Frutkin, referred to *supra*, already state that Greenglass on the first evening he was interrogated drew a sketch of the lens mold apparatus about which he testified.

The fact that Greenglass saw Harry Gold while the two of them were lodged in the same prison was admitted by Greenglass at the trial. He further denied that they consulted on the testimony they gave at the trial. Defense counsel did not see fit to cross-examine Harry Gold at all and therefore did not inquire on this subject from him.

The vague insinuations that "books" of unnamed variety were brough- to Greenglass at the Tombs, and that he "consulted" with unnamed persons does not raise any issue cognizable on this motion. There is no allegation that any [fol. 176] of this will in any way contradict any trial testimony, and no showing that even if such contradiction might exist, the facts were knowingly and wilfully suppressed by the Government at the trial. Dr. Walter Koski testified that Greenglass' sketch was of a device that Koski had developed in original research and that there was nothing in scientific textbooks pertaining to this device. Despite the long list of texts cited by defendants, they point to no place where Greenglass could have obtained the information necessary to make the sketch, apart from his own memory.

The last charge in this section of the moving petition is that regarding the Schneider testimony. The defendants

on the appeal from their convictions vigorously but unsuccessfully attacked the propriety of calling Schneider as a witness at the trial. Now using what is at best an ambiguous question and seizing an extrajudicial unsworn statement in a book they charge wilful perjury. Certainly the question as to when the witness last saw the defendants, in the context in which it was asked at the trial, was susceptible of a construction by the witness that the examiner was seeking to establish whether or not the witness had seen the defendants subsequent to the time when he took their passport photos and prior to the trial. (R. 1437) This, in fact, was defendant's interpretation, as shown by the question asked on cross-examination.

[fol. 177] Attached hereto is an affidavit of Special Agent Walter Roetting, which clearly established that the identification was effected on the first occasion when Schneider was interviewed, without any prompting whatsoever. The affidavit of Special Agent John A. Harrington discloses that the day prior to Schneider's testimony, Schneider was brought into the courtroom by Harrington and seated in the front row. Harrington then asked Schneider to see if he could identify the man whose picture he had taken. Schneider identified Julius Rosenberg as the person whose picture he had taken. At no time did Harrington suggest to him which person should be identified. So that at best this argument becomes no more than a quibble. The issue is collateral. The question was ambiguous in the setting. Most assuredly there was no "official condonation" of false testimony and the charge that the conviction was "steeped in fraud" is untrue and not established in the papers. Nor is it established that Schneider's answer was "wilfully untrue." Schneider had not seen Rosenberg outside of the courtroom since he had taken the pictures. That was the question asked on cross-examination by defense counsel which the court and the United States Attorney believed had been previously answered. (R. 1437). Defense counsel appeared uncertain about what had been said. Under *then* circumstances the possible error in detail in answering an ambiguous question about an unimportant matter, can hardly ground a motion under Section 2255.

[fol. 178] III

The final ground of attack is that the information allegedly turned over by the defendants to the Soviet Union was not secret. Fundamentally, it must be remembered that the charge in his case was *conspiracy to commit espionage.* It was not incumbent upon the Government as part of the charge necessarily to prove that any information was actually transmitted. The allegations of the indictment would have been fully proved without any such evidence.

However, to go further, the issue now raised was conceded by the defendants at the trial. Specifically, at page 883 of the printed record on appeal, defense counsel, who makes the present charges, stated in open court that he did not intend to dispute that "anything connected with Los Alamos was secret and restricted, even the names of the persons who were working there." He stated further that "there is no dispute that the Los Alamos project was a restricted and secret project. . . ." Having conceded this fact at the trial, he certainly is in no position now to urge that the information allegedly transmitted was not most highly classified. Furthermore, in addition to the concession by defense counsel, there was considerable evidence at the trial concerning the classified nature of the information. This evidence was uncontradicted and undisputed. The jury was not urged by the defense to question that proposition.

The many pages of the moving petition giving counsel's conception of the problems involved in atom bomb production are meaningless on this application. Of course, fundamental propositions of physical law are not the secret matter involved. It is the translation of these propositions to workable devices that is so carefully guarded. Defendants cite no source showing that the particular device here in [fol. 179] issue, the high explosive lens developed at the Atomic Energy Project at Los Alamos, was a matter of public knowledge. The entire presentation in this regard does not in any way contradict the sworn testimony at the trial of the scientist who was responsible for lens experimentation.

Apart from the particular device, there was testimony at the trial of the transmission of other classified matter, in-

cluding the names of some of the scientific personel working at the Los Alamos project, the physical layout of the project, and the security regulations there in effect. There is no dispute that this matter was properly "classified."

It is clear, on the face of defendants' papers, and when they are considered in conjunction with the record, that their contention with respect to the classified nature of the information is wholly frivolous.

The entire motion being without merit on the face of the papers, and when considered along with the record and the *uncontradicted* affidavits attached hereto, there is no warrant to hold any hearing or to require the taking of testimony. What the defendants are apparently seeking, based only on unsupported allegations which mention neither persons, time, nor place of wrongdoing, is an investigation of the Government in the hope that they will come up with some incident which will perpetuate the myth of their innocence. A motion under Section 2255 cannot be grounded on unfounded speculation, nor should it be abused by reliance on fiction instead of fact.

Wherefore, it is respectfully submitted that the motion should be in all respects denied.

Myles J. Lane, United States Attorney.

Sworn to before me this 1st day of December, 1952.

[fol. 180] In United States District Court

[Title omitted]

Affidavit of John M. Foley in Opposition to Motion

State of New York,
County of New York,
Southern District of New York, ss.:

John M. Foley, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Myles J. Lane, United States Attorney for the Southern District of New York.

This affidavit is submitted in opposition to the motion of

the defendants to vacate and set aside the judgments of conviction. The defendants claim that at a "crucial moment" during their trial, to wit, March 14, 1951, there was made public an indictment of one William Perl. It is the defendants' contention that the news coverage which followed the indictment, arrest and arraignment of William Perl on March 14, 1941 caused them serious injury at their trial and that the indictment of Perl together with the news coverage that followed was incited and calculated by the prosecution to prejudice the movants and brought "improper pressure to bear on the jury".

The indictment of William Perl resulted from investigations conducted by a Federal Grand Jury sitting in the Southern District of New York, the Federal Bureau of [fol. 181] Investigation and the Office of the United States Attorney. This investigation was under way prior to the indictment of the Rosenbergs and Sobell.

William Perl appeared before the grand jury under subpoena and testified several times. During this period the grand jury was conducting an extensive investigation of possible violations of the federal criminal laws, including the espionage laws, and William Perl was interrogated about his knowledge of persons who were believed to have violated the law. After William Perl had denied knowing Julius and Ethel Rosenberg, Morton Sobell, Michael and Ann Sidorovich, and Max and Helene Elitcher, it was necessary to conduct an extensive investigation to ascertain the truth of these statements, and the extent, if any, of William Perl's association with these people. On March 6, 1951, at approximately 6.15 P.M., William Perl, in the presence of his attorney, Mr. Raymond Wise, and in the presence of several Assistant United States Attorneys and two Special Agents of the Federal Bureau of Investigation, stated that he had lied to the Federal Bureau of Investigation and the grand jury in that he had minimized his associations with Morton Sobell and other persons. A true bill was voted and the indictment handed down within a week of this admission. This indictment was sealed on the application of the grand jury on March 13, 1951 by Henry W. Goddard, United States District Judge, the Judge sitting in the criminal calendar part of the court. This request was made to Judge Goddard

at my suggestion so as to deprive William Perl, who at that time was in possession of a passport, of an opportunity to flee this jurisdiction if that was his intention. It is common [fol. 182] practice to seal an indictment under such circumstances until apprehension is made certain. On March 14, 1952 Perl's whereabouts became definitely known to representatives of the Federal Bureau of Investigation at about 6:00 P.M.

Upon being informed by the Federal Bureau of Investigation that Perl's whereabouts had been ascertained, I immediately sought Judge Goddard to unseal the indictment. Judge Goddard, however, had by that time left the Courthouse. In such circumstances, I followed the usual practice of the office, and began to look for a judge to whom I could make this application. None were available. I recall having telephoned the home of Judge John F. X. McGohey. He was not at home. I called several other judges at their homes but these efforts were likewise of no avail. I then located Judge Irving R. Kaufman. He stated that he would entertain the application and the application was made before him shortly thereafter. That this application was made before Irving R. Kaufman, the Judge presiding at the trial of the movant and the Rosenbergs is a coincidence as he was the first available Judge who could be located, and it was necessary in the administration of justice to obtain a warrant of arrest.

It is not at all unusual for a judge other than the one sitting in the criminal calendar part of the court to entertain an application to unseal an indictment and issue a bench warrant for the apprehension of a defendant. Especially is this true of other judges sitting in criminal parts of the court other than the calendar part. So far as I know, no judge has ever denied the application of an Assistant United States Attorney to unseal an indictment.

[fol. 183] At the arraignment of William Perl before Judge Goddard on March 15, 1952, I accurately and carefully identified the defendant and stated very briefly what his association was, as I understood it, with the persons named in the various counts of the indictment. None of my remarks were calculated to prejudice the movants at their trial, but were directed to enable the court to make an in-

formed decision on the amount of bail to be fixed in the case of William Perl.

The indictment of Perl and his subsequent arraignment were not calculated to prejudice or affect the trial of the movants.

John M. Foley.

Sworn to before me this day — of November, 1952.

[fol. 184] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID SWEENEY IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

David Sweeney, being duly sworn, deposes and says:

I am a Deputy Clerk in the Office of William V. Connell, Clerk, United States District Court, Southern District of New York. I have been so employed since June, 1931, almost all of which time I have served in the criminal calendar part of the court.

On March 14, 1951, I was called, after I had returned home from work, and was informed that an application was to be made to unseal an indictment and for a bench warrant. I returned to the United States Court House, obtained the sealed indictment and accompanied John M. Foley, an Assistant United States Attorney to the presence of Judge Irving R. Kaufman. I was informed by Mr. Foley that he had attempted to locate Judge Henry Goddard, the judge sitting in the criminal calendar part, but without success.

Mr. Foley made a motion to unseal the indictment, which was granted. An application for a bench warrant calling for the arrest of William Perl, the person named in the indictment, was made, and upon the direction of Judge Kaufman, a warrant was issued.

[fol. 185] From my experience in the office of the Clerk of the criminal calendar part of the court, I know that it is not — all unusual for a judge other than the criminal calendar judge to entertain such an application, especially in the unavailability of the judge sitting in the criminal calendar part. Frequently, in such circumstances, judges other than the calendar judge preside when a grand jury returns an indictment, or when an arraignment is held, or an indictment is unsealed. The usual practice is to seek a judge who is assigned to one of the criminal trial parts, or if none is available, then the first judge who can be located is asked to preside.

To my knowledge of more than 20 years in the court, no judge, to whom an application such as that made in the case of William Perl, has refused to grant the application.

Sworn to before me this — day of November, 1952.

—— ——.

Sworn to before me this day of November, 1952.

—— ——.

[fol. 186] In United States District Court

[Title omitted]

Affidavit of John W. Lewis in Opposition to Motion— Dec. 1, 1952

John W. Lewis, being duly sworn, deposes and says:

I am a Special Agent in the Federal Bureau of Investigation and have been so employed since 1942. On the afternoon of June 15, 1950, in the company of Special Agent Leo H. Frutkin, in the course of my official duties, I went to the home of David Greenglass at 265 Rivington Street, New York, New York. After being in his home for approximately three hours, Special Agent Frutkin and I asked Greenglass to accompany us to the office of the Federal Bureau of Investigation in the United States Court House, Foley Square, New York, New York, for the purpose of an interview.

Special Agent Frutkin and I interviewed Greenglass on that evening and during the interview, Greenglass admitted that he had been requested by Julius Rosenberg, through Ruth Greenglass, to furnish information concerning the Los Alamos Atom Bomb Project to be turned over to a courier for the purpose of transmittal to the Soviet Union. He further admitted that on a subsequent occasion [fol. 187] he did turn over top secret information to Harry Gold. He further stated that the information given related to a high explosive lens. Greenglass, without any help or assistance whatsoever, drew a sketch of the lens showing a high explosive implosion device. Greenglass further admitted that he had given to Gold a list of names of persons working at Los Alamos whom Greenglass considered to be approachable for information and also that he identified various scientists working at Los Alamos.

These statements were freely and voluntarily given without any promise of reward being made to Greenglass by any one on behalf of the United States Government.

To the best of my knowledge and belief, this was the first occasion that David Greenglass had been interviewed in connection with the furnishing of information concerning the Los Alamos Atom Bomb Project.

Under no circumstances and at no time did I ever make available to Greenglass any books or scientific texts nor any other material pertaining in any way to atomic energy. To the best of my knowledge and belief, no other agent of the Federal Bureau of Investigation furnished any such material to Greenglass.

(S.) John W. Lewis.

Sworn to before me this 1st day of December, 1952.

—— ——.

[fol. 188] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN H. FRUTKIN IN OPPOSITION TO MOTION—Dec. 1, 1952

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Leo H. Frutkin, being duly sworn, deposes and says that:

I am a Special Agent of the Federal Bureau of Investigation, and have served in that capacity since 1940.

In the course of my official duties, I interviewed David Greenglass on June 15, 1950, in the company of Special Agent John W. Lewis.

I have read the affidavit of Special Agent John W. Lewis, and I now state that it is true and correct, to the best of my knowledge and belief.

(S.) Leo H. Frutkin.

Sworn to before me this 1st day of December, 1952.

— —.

[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER C. ROETTING IN OPPOSITION TO MOTION—Dec. 1, 1952

STATE OF NEW YORK,
County of New York, ss:

Walter C. Roetting, being duly sworn, deposes and says:

I am a Special Agent of the Federal Bureau of Investigation and have been so employed since 1941. On March 26, 1951, in the company of Special Agent Lester O Gallaher, I went to the photo shop of one Ben Schneider, located at 99 Park Row, New York, New York. At that establishment, I exhibited photographs of Julius Rosenberg

and asked Mr. Schneider whether he had ever seen this man. Mr. Schneider promptly identified a photograph and stated that he had taken photographs of this man, his wife and two children some time previous to my visit. He recalled that he had taken the photographs on a Saturday and that he particularly recalled this occasion as he did not usually go to work on Saturdays. He further recalled that the order placed by this man had been larger than the usual order for photographs. He stated that he was pleased to receive such a large order on a Saturday. In recalling the event, he stated that he particularly remembered that the two children were very unruly and caused him a great deal [fol. 190] of trouble. He also recalled that the man whose picture he identified had stated to him that the pictures were needed because his wife had recently inherited some money in France and that he and his family were going to France to collect the inheritance.

This was the first occasion upon which I had seen Mr. Schneider and so far as I know no agent of the federal government had interviewed him previously in connection with this or any related matter. Prior to showing Mr. Schneider the photograph, I did not identify the name of the person whose picture I was showing to Mr. Schneider, nor the reasons for which I desired an identification.

——— ———.

Sworn to before me this 1st day of December, 1952.

——— ———.

[fol. 191] UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN A. HARRINGTON IN OPPOSITION TO MOTION —December 1, 1952

STATE OF NEW YORK,
County of New York,
Southern District of New York. ss:

John A. Harrington, being duly sworn, deposes and says:

I am a Special Agent of the Federal Bureau of Investigation and have been so employed since 1943.

On March 26, 1951, during the course of the trial of the above-named defendants, I met Special Agents Walter Roetting and Lester O. Gallaher in the vicinity of Courtroom 110 in the United States Courthouse. I was informed by these agents that they had located a photographer who had identified a photograph of Julius Rosenberg as a person whose passport photograph he had taken. At this time, I was informed that the photographer was at 99 Park Row, New York City.

I communicated these facts to Mr. Irving H. Saypol, United States Attorney for the Southern District of New York, who directed that the photographer be brought to the United States Courthouse to confirm the identity of Rosenberg previously made. I communicated this information to Agents Roetting and Gallaher.

[fol. 192] Shortly thereafter, I again met Agent Gallaher who had with him a man whom I now know as Ben Schneider, a photographer of 99 Park Row, New York City. I brought Mr. Schneider into Courtroom 110, to the fore part of the courtroom inside the railing where there were two vacant seats. I instructed Mr. Schneider to look round the court room and see if he saw anybody he recognized. I did not point out any specific person to Mr. Schneider. Mr. Schneider looked around and, when he saw Julius Rosenberg, he stated to me that that was the man whose pictures he had taken.

At no time did I point out or in any other way indicate who was Julius Rosenberg or the place where he was located in the courtroom to Mr. Schneider.

John A. Harrington

Sworn to before me this 1st day of December, 1952.

[fol. 193] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EMANUEL H. BLOCH IN REPLY TO OPPOSITION—December, 2, 1952

STATE OF NEW YORK,
County of New York, ss:

Emanuel H. Bloch, being duly sworn, deposes and says:

1. I am the attorney for the petitioners, Julius Rosenberg and Ethel Rosenberg, in the pending application to vacate and set aside their sentences under the provisions of Section 2255, Title 28, U. S. C. I have been the attorney for these petitioners since the date of their respective arrests on July 17, 1950 and August 11, 1950.

2. This affidavit is submitted both in reply to the affidavits submitted in opposition to the petitioners' application and in supplementation of the moving papers herein.

3. The affidavit of Myles J. Lane, The United States Attorney for the Southern District of New York, submitted in opposition to the petitioners' application, raises the question of waiver as a bar to the relief requested by the petitioners on the ground of adverse general pre-trial publicity, and pre-trial publicity stimulated and generated by the prosecutive and investigative officials of the United States Government.

[fol. 194] Mr. Lane avers on page 2-3 of his affidavit "It may reasonably be assumed that the astute counsel for the defendants, and the defendants themselves, read the newspapers prior to the trial as they were part of the community in which the alleged hostility was engendered . . .", and concludes (page 5) "They (counsel for the defendants and the defendants) deliberately chose a different course than they now pursue."

Both the assumption and the conclusion are unfounded, untrue and unwarranted. To understand why counsel for these defendants-petitioners did not raise the pre-trial publicity point prior to and during the trial, it is necessary to comprehend the nature and character of the pre-trial publicity.

It is only the mass of newspaper publicity, concerning not only the petitioners personally, but the total publicity accorded issues which could arouse the public mind to hostility against these defendants that make this petitioners' point meaningful. This type of publicity commenced as far back as February 1950, when Dr. Fuchs was arrested, six months prior to the arrest of either of the petitioners, and continued without break up to and through the arrests of the petitioners and up to and through their trial. These issues are set forth in their proper setting and context in the petition that is the basis of the present application.

Only a presentation that is as comprehensive, detailed and documented as set forth in the petition could adequately demonstrate the totality of the pre-trial publicity as well as its cumulative effect in terms of prejudicing the defendants [fol. 195] and making it impossible for them to secure a fair and impartial trial. Such a presentation required a perusal and analysis of every newspaper and magazine circulated in the metropolitan area. It was only the total picture that could persuade a responsible counsel that the character of publicity to which these petitioners were subjected rose to the level of legal and constitutional objectionability.

This complete picture was unavailable to me from the date of my retainer up to and through the petitioners' trial. Nor could the entire panorama have been revealed to me by the usual sporadic reading of an average newspaper reader in New York City. Being unaware of the total picture, I was unaware of the applicability of the legal concepts that are now raised on this petition. I certainly was unaware of the full facts and effects of the role of the prosecutive and investigative officials of the United States Government specifically in relation to the case of these petitioners. From the time I was retained by the petitioners I was so immersed in representing them on their arraignments and other court hearings, and investigating the merits of the charges against them for the purpose of defense, that I read the newspapers infrequently and was not cognizant of the many releases and press statements fed to the press by the United States officials.

I most emphatically deny that I made any deliberate choice in tactics by failing to raise the issue of pre-trial

publicity as a deprivation of due process of law. I could make no "deliberate choice" because I was unaware that I had a choice.

At the time I was retained by the petitioners and up to the present, I was and am a single practitioner. The only [fol. 196] aid I received was the advice of Alexander Bloch, Esq., my father, a lawyer of long standing and a man of over seventy years of age. By reason of his age and physical limitations his function was confined to that of trial counsel for Ethel Rosenberg. Even though he participated in some of the consultations with the petitioners prior to trial, the main brunt of the pre-trial legal work and efforts had to be assumed by me.

As appears from the files of this Court, the petitioners were, prior to and at the time of their trial, paupers. A pauper's affidavit was submitted to this Court and Mr. Justice Irving R. Kaufman, the trial judge, granted the application of the petitioners that they receive daily copy of the trial testimony without charge on the basis that they made a showing that they were paupers. The meager fee I received is revealed in my affidavit submitted in connection with that application. Consequently, I was compelled to do the major share of the preparatory trial work alone and could not afford to hire any separate investigators or conduct any investigation that entailed the paid services of others.

Only recently, within the last few months, when funds were made available to me for necessary disbursements in connection with processing the petitioners' case by a group of interested persons, was I enabled to probe the newspaper material that surrounded this case, which led me to the conclusion that it was proper to raise the issue of the pre-trial publicity. Some indication of the work and money involved can be seen by the circumstances that it required three weeks of full time endeavor by three persons trained in the newspaper field, and an additional three [fol. 197] weeks of full time services of one such person to collate the material, contained in Exhibits I-XV. There was also entailed approximately a full month of my own time to digest this material with a view to making a proper legal evaluation and presentation. Omitting the value of my services, the expenditure for performing this task and for

securing the reproduction of the newspaper articles as exhibits for the Court, exceeded several thousand dollars. Such a sum had been unavailable to me prior to or during the trial.

The averments in Mr. Lane's affidavit (page- 3 and 4) that the petitioners have not shown that the petit jury that passed on the issues of the petitioners' case were not prejudiced, in the light of the trial court's voir dire examination, is legally irrelevant under the *Delaney* case. There the Court legally presumed that where the pre-trial publicity was of such a virulent character as to create a pervasive, hostile climate in the community, the jurors who sat on the case could not escape its influence despite routine precautions taken by the Court.

On page 6 of Mr. Lane's affidavit, he attempts to underplay the prejudice in the instant case by comparison with the *Delaney* case because in this case "There was no public hearing after indictment, and no parade of witnesses prior to trial. . . ." Indeed, what happened in this case was in the eyes of the law according to the *Delaney* case more reprehensible, because it was the prosecuting officials themselves that fed to the press the kind of material that, in the *Delaney* case, was furnished at a legislative hearing, by a "parade of witnesses prior to trial."

[fol. 198] As the petition shows, the statements here released by the officials to the press were not mere routine statements. The Government cannot escape its responsibility by claiming that it ought not to have restrained the press. The petitioners' position that the Government itself should not promulgate public statements adversely reflecting on the innocence of a defendant awaiting trial on a criminal charge.

4. On page 10 of Mr. Lane's affidavit, he attempts to explain away petitioners' contentions relating to the Perl indictment. Mr. Lane claims that the indictment was found a week after an alleged admission of Perl that he had perjured himself. But this is a truncated version of all the facts. Even the record of this case demonstrates that there had been testimony available to the prosecution long before March 1951 which was inconsistent with the alleged testimony of Perl before the Grand Jury in August and September of 1950 (R. 303-5). Upon information and belief,

an examination of the minutes of the proceedings of the Grand Jury which indicted Perl will support this contention.

At any rate, it is significant that the Government fails to make any comment with respect to its failure to bring Perl to trial to date as evidence of their *male fides* in procuring the indictment, when it did.

Indeed, it is because of the insight, gained in retrospect by the failure to bring Perl to trial, that the petitioners now advance this incident as part of a design to inflame further the public climate against the petitioners, as they were on trial. Conversely, this explains why no motion for a mistrial was made by defendants' counsel at the time the Perl [fol. 199] indictment was publicly unsealed and Perl arrested. The record shows that an off-the-record colloquy occurred between Judge Kaufman, Mr. Saypol and defense counsel, on the day the Perl indictment was publicly revealed (R. 756-7; 816). At that conference, the trial judge's attention was directed to the public disclosure of Perl's indictment and the resultant concern of defense counsel. Mr. Saypol peremptorily and with a show of irritation stated the Perl indictment had been returned in the regular course of the administration of criminal justice. Whereupon, Judge Kaufman, in words or substance, indicated that defense counsel had the word of Mr. Saypol. Whereupon, defense counsel relied upon this representation. It was only when subsequent events disclosed the Government's failure to bring Perl to trial, and its resistance to his efforts to secure a speedy trial, that a reflection was cast on Mr. Saypol's *bona fides* in passing his word, and led to the conclusion that the timing of the Perl indictment was part of the damaging government-inspired publicity which prejudiced the defendants in contravention of their constitutional rights.

Finally, Mr. Foley's opposition affidavit relates to the propriety of his remarks to the Court on the unsealing of the Perl indictment. He simply does not respond to the matter complained of in the petition and, indeed, admits not merely that the New York Times reported Mr. Saypol as having stated that Perl would have corroborated Greenglass, but likewise admits, by failure to deny, that the New York Times was accurately quoting Mr. Saypol.

[fol. 200] 5. On page 11 of Mr. Lane's affidavit, he states that the petitioners raised, on their appeal to the Court of Appeals, the perjury of Greenglass with respect to his immediate cooperation with the authorities. This is not the fact as is revealed by the petitioners' briefs to the Appellate Courts, submitted to this Court and now in its possession.

On this question, it was Mr. Saypol who stated, on Greenglass' sentence, *subsequent* to trial and sentence of the petitioners, that Greenglass did not cooperate with the authorities from the outset. The affidavits of FBI agents, John Lewis and Leo Frutkin, appear to contradict Mr. Saypol's statement. This presents a question of fact for determination by the Court as to whether Mr. Saypol was stating the truth or whether the FBI agents are now stating the truth.

6. As to the coaching of Greenglass, Mr. Lane's affidavit makes no denials of the allegations of the petition with respect to this subject. The affidavits of FBI agents Frutkin and Lewis merely state that they personally did not ever make available to Greenglass "any books or scientific texts or any other material pertaining in any way to atomic energy." These agents carefully formulate the participation of other Government officials as follows:

> "To the best of our knowledge and belief, no other agent of the Federal Bureau of Investigation furnished any such material to Greenglass."

In short, there is no denial that some other Government official, either on the prosecuting staff or otherwise working for or with the FBI, did make available to Greenglass the coaching material, or that he was otherwise coached.

The statements of Mr. Lane that the petition is defective (pp. 13-14) because the petition does not name the "variety of books" consulted by Greenglass or the names of the [fol. 201] persons with whom he consulted overlooks the specific allegations of the petition. There it is stated that the books related to scientific matters touching upon the subject of atomic energy. At least one person, to wit, Gold, is named. Furthermore, Gold and Greenglass were lodged on the eleventh floor of the Tombs for many months prior to the trial. There are no separate cells on this floor, which

is reserved for "informers," and they are permitted to fraternize without any molestation or restraint by the guards. This circumstantial evidence of the opportunity of Gold and Greenglass to consult with each other corroborates the statements of the petition.

7. Despite attempts to mitigate its effect, the allegations of the falsity of the Schneider testimony have been admitted.

8. The Government misconceives the third point of the petition. The only concession made by petitioners' counsel was that the material allegedly transmitted had been classified as secret. It would seem almost unnecessary to point out that this has nothing to do with the petitioners' present claim that the materials were *arbitrarily* classified as secret. As is more fully set forth in the petition, for this reason no crime was committed. The question of waiver can never arise under these circumstances, for no litigant can confer upon a court the jurisdiction to impose sentence where there is no crime.

9. Upon all the papers submitted to the Court on this application, it is clear that there are controverted issues of fact that require a hearing before a legal determination can be properly made by this Court.

——.

Sworn to before me this 2nd day of December, 1952.

[fol. 202] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EMANUEL H. BLOCH IN REPLY TO OPPOSITION—December 5, 1952

STATE OF NEW YORK,
County of New York, ss:

Emanuel H. Bloch, being duly sworn, deposes and says:

From the time the pending application of the defendants-petitioners under Section 2255, Title 28, U.S.C. was argued before Hon. Sylvester J. Ryan on December 2, 1952, and in

accordance with permission granted to file supplemental affidavits to be submitted by noon December 5, 1952, after the refusal of the said Honorable Justice to permit the petitioners to use the subpoena process to prove the allegations of the petition, I have used every reasonable effort to procure affidavits in support of the factual matters alleged in the several petitions now before the Court.

On December 3, 1952, I telephoned Hon. Irving H. Saypol, now a Justice of the Supreme Court of the State of New York, and formally and at the time of the arrest and trial of the defendants-petitioners, the United States Attorney for the Southern District of New York, for the purpose of procuring an affidavit from him in connection with relevant matters on this application, I asked him to affirm or deny the statements attributed to him by the various newspaper articles, which are Exhibits II to XV on the pending appli- [fol. 203] cation before Hon. Sylvester J. Ryan. I offered to meet him to show him the said exhibits and the statements attributed to him. He categorically refused either to affirm or deny the said statements.

I communicated by telephone with all of the newspapers, articles of which comprise Exhibits II to XV in the pending application.

The New York Times authorities cooperated to the utmost of their ability but because of the shortness of time, I was unable to procure anything but the affidavit of Edward Ranzal which is being submitted and filed as a supplementary affidavit.

I communicated with the New York Herald Tribune, which likewise used every reasonable effort to cooperate with me, but again, because the relevant stories attributing statements to public officials carried no by-line, except one, this newspaper could not obtain, within the limitations of time, the names of the newspaper reporters who wrote the articles. I did, however, communicate with Milton Lewis, who wrote one of the relevant stories, and he has promised to make an affidavit, which will be submitted and filed as a supplementary affidavit herein.

I communicated with the New York Daily News and was informed that one Norma Abrams was the reporter who wrote the stories concerning the relevant facts on this application. I telephoned Miss Abrams and asked her to sub-

mit an affidavit averring to the accuracy of her stories and the statements attributed to public officials contained therein. She told me that much time has elapsed since the stories were written (1950 and March 1951) and she had no independent recollection of the contents of her stories, and that [fol. 204] even if the stories were exhibited for her inspection and examination, she would still have no independent recollection of these stories so as to submit an affidavit in support of their veracity and accuracy.

I communicated with the New York Daily Mirror by telephone and was directed to one Marion Selestino, the secretary to the Editor of the said newspaper. She told me, after I requested her that I desired an affidavit from the reporter or reporters who wrote certain stories in which certain statements were attributed to public officials, that she would take it up with the proper officials. I telephoned her again and she told me that, according to the policy of the paper, it was "inadvisable" to give me the requested information in affidavit form.

I telephoned the New York Evening Journal and was referred to Paul Schoenstien, the City Editor and I made my request for the relevant information contained in certain newspaper stories the dates of which I gave him, in affidavit form. He referred me to Carl Helm, the attorney for the said newspaper. I was unable to talk to Mr. Helm but left word that he telephone me, adding the purpose of my request. He never telephoned me and I have been unable to communicate with him.

I communicated with the New York Post by telephone and was referred to a Mr. Berger, the attorney for the said newspaper. I gave him the issues in which I was interested and which were relevant to verify the statements attributed to public officials in connection with the defendants-petitioners' case. He told me that he would try to ascertain the newspaper reporter who wrote the stories. He called me [fol. 205] and told me that apart from Bennett Schiff and George Trow, the other stories carried no by-lines and the paper was unable, within such short notice, to inform me who these people were. I then communicated with Bennett Schiff and he has promised to affirm the veracity of his story and the accuracy of the statements attributed to public officials contained therein. I have submitted an affidavit for

his signature and expect that the same will be submitted to this Court as part of the supplementary affidavits herein. I also communicated with George Trow, another newspaper reporter attached to this newspaper and he promised to verify the accuracy of his story of the statements attributed to public officials contained therein, which he said he would mail to me. As of the dictation of this affidavit, I have not yet received his affidavit.

I likewise called one Gertrude Evans, to call on the Department of Justice, Public Relations Division, to obtain the press release issued on July 17, 1950 by the then Attorney General J. Howard McGrath and the FBI head, J. Edgar Hoover, in connection with the arrest of the petitioner, Julius Rosenberg. She telephoned me and told me that she had received a true copy of the official release issued by the Department of Public Relations of the Department of Justice containing the joint statement of Mr. McGrath and Mr. Hoover. That joint statement was accurately reported in the exhibits attached to the petition. She told me that she was mailing, as of 6:00 o'clock, December 4, 1952, airmail special delivery, her affidavit and the aforesaid press release annexed thereto to me. As of the present writing, 10:00 o'clock, December 5, 1952, I have not received the same but I expect to receive it sometime during this December 5, 1952 and request that time be alloted me [fol. 206] to submit this supplementary affidavit as part of the papers in this application.

I again renew the request on behalf of the petitioners for the use of the subpoena process of this Court in aid of this application. I again renew my motion on behalf of the petitioners for a stay pending the determination of this application and respectfully ask leave to make further application for a stay in the event the Court directs a hearing on this application or, in the event that the Court make other disposition of this application.

(S.) Emanuel H. Bloch.

Sworn to before me this 5th day of December, 1952.

[fol. 207] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GERTRUDE M. EVANS

DISTRICT OF COLUMBIA, ss:

Gertrude M. Evans, being first duly sworn deposes and says:

On December 4, 1952 I visited the Department of Justice Building in Washington, D. C. and obtained from the Public Relations Section there the attached press release and was told by the woman who gave me this release that it was an official release of the Department of Justice, July 17, 1950.

(S.) Gertrude M. Evans.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 4th day of December 1952. (S.) Susan J. Wilson, Notary Public. My Commission expires November 15, 1957.

[fol. 208] For Immediate Release
Monday, July 17, 1950

Department of Justice

Attorney General J. Howard McGrath and J. Edgar Hoover, Director of the Federal Bureau of Investigation, announced the arrest today of Julius Rosenberg, age 32, by FBI Agents in New York City, New York, on a charge of conspiracy to commit espionage.

J. Edgar Hoover, Director of the Federal Bureau of Investigation, in discussing the background of the case, said that Rosenberg is another important link in the Soviet espionage apparatus which includes Dr. Klaus Fuchs, Harry Gold, David Greenglass and Alfred Dean Slack. Mr. Hoover revealed that Rosenberg recruited Greenglass and at his instigation the latter made classified, technical information on the A-bomb available to both Gold and Rosenberg in 1945. He stated that Rosenberg gave Greenglass specific instructions as to the type of information Russia desired.

Investigation to date reveals that Rosenberg, an American-born engineer made himself available to Soviet espionage agents so he "could do the work he felt he was slated for" and so he might "do something to directly help Russia."

Rosenberg, in early 1945, made available to Greenglass while on furlough in New York City one half of an irregularly cut jello box top, the other half of which was given to Greenglass by Harry Gold in Albuquerque, New Mexico as a means of identifying Gold to Greenglass. On this occasion in June, 1945, Greenglass was paid $500 by Gold who obtained it from his Soviet superior Anatoli A. Yakovlev, Vice Counsul of the Soviet Consulate in New York City. Greenglass then turned over to Gold classified information he had secured from the Atom Bomb Project at Los Alamos, [fol. 209] where he was stationed at the time as a soldier.

After Fuchs and Gold were arrested in February and May, 1950, respectively, Rosenberg warned Greenglass to leave the country and supplied him with substantial funds in twenty-dollar bills to do so. He instructed Greenglass to surreptitiously obtain a passport to Mexico, travel to Switzerland and thereafter report to the Soviet Embassy in Czechoslovakia. Shortly thereafter Greenglass was arrested by the FBI.

The gravity of Rosenberg's offense, Mr. Hoover stated, is accentuated by the fact that through his implication in the espionage ring as a native born American citizen he aggressively sought ways and means to secretly conspire with the Soviet Government to the detriment of his own country.

Julius Rosenberg was born May 12, 1918, at New York City and was graduated from the College of the City of New York with a B.S. Degree in Electrical Engineering in February, 1939. Following employment with various Manhattan and Brooklyn electrical engineering firms, he was employed as a junior engineer in the Signal Service, War Department, Supply Office, New York General Depot, Brooklyn, on September 3, 1940. Thereafter he was transferred to the Signal Corps, Philadelphia, Pennsylvania, as an Assistant Engineering Inspector working in Philadelphia, Pennsylvania and New Jersey areas. He was promoted to Associate Engineering Inspector on February 16,

1943, and continued in this position until his employment was suspended on February 9, 1945, when he was removed by the Secretary of the War Department acting on the recommendation of Rosenberg's commanding officer on the basis of information indicating Communist Party membership. Rosenberg made numerous unsuccessful attempts to be reinstated. Subsequent to leaving the Signal Corps, he [fol. 210] purchased and operated the Pitt Engine Products, Incorporated, 370 East Houston Street, New York City. Rosenberg, married, father of two children, resided at 10 Monroe Street, New York City.

A complaint charging Rosenberg with conspiracy to violate Section 32a (Espionage Act), title 50, U.S. Code, was filed before Federal Judge John F. X. McGohey, Southern District of New York.

[fol. 211] UNITED STATES

v.

JULIUS ROSENBERG

AFFIDAVIT OF WILLIAM F. NOLAN—Complaint, Title 50, Section 34, U. S. C., 1946 Edition

William F. Nolan, being duly sworn, deposes and says that he is a special Agent of the Federal Bureau of Investigation, Department of Justice, and upon information and belief, alleges and charges as follows:

That from on or about November 1, 1944, and continuously thereafter up to and including June 16, 1950, in the Southern District of New York, Julius Rosenberg, the defendant herein, did, the United States of America being then and there at war, combine, conspire, confederate and agree with David Greenglass, Harry Gold, and others to deponent unknown, to violate subsection (a) of Section 32, Title 50, United States Code, in that they did combine, conspire, confederate and agree, with intent and reason to believe that it would be used to the advantage of a foreign nation, to-wit: the Union of Soviet Socialist Republics, to communicate, deliver, and transmit, and attempt to communicate, deliver, and transmit to a foreign government, to-wit: the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings,

sketches, notes and information relating to the national defense of the United State, to-wit, documents, writings, sketches, notes and information relating to atomic energy and nuclear fission.

Pursuant to the said conspiracy and to effect the objects thereof, the defendant and co-conspirators did commit, among others, the following overt acts:

1. On or about the tenth day of January of 1945, the exact date being to your deponent unknown, at the Southern District of New York, the defendant Julius Rosenberg met and conferred with David Greenglass.

[fol. 212] 2. On or about the twenty-third day of May, 1950, the exact date being to your deponent unknown, the defendant Julius Rosenberg gave a sum of money to David Greenglass.

In violation of Section 34, Title 50, United States Code (1946 Ed.).

The sources of deponent's information and grounds of his belief are investigations made by him in the course of his official duties.

Whereas, deponent prays that a warrant may issue for the apprehension of the above-named defendant and that he may be arrested and imprisoned or bailed as the case may be.

Sworn to before me this seventeenth day of July, 1950.

(S.) William F. Nolan, Jr.

Approved: Miles Lane.

Before Judge John F. X. McGohey, United States District Judge for the Southern District of New York.

[fol. 213] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MILTON LEWIS IN REPLY TO OPPOSITION—December 5, 1952

STATE OF NEW YORK,
County of New York, ss.:

Milton Lewis, being duly sworn, deposes and says:

I am a newspaper reporter employed by the New York Herald Tribune, a newspaper published and circulated in and about the City of New York.

I was employed by the said newspaper in the capacity aforesaid for some time, including in or about the month of August, 1950, and I am still employed by the said employer.

I wrote for my employer a story (amongst others) which appeared in the said paper on August 18, 1950 (Exhibit VIII-B-7), under my by-line, which carried the heading "3 Indicted in Harry Gold Atom Spy Plot." The contents of this story accurately represent the facts stated therein and any statements contained in this story attributed to public officials or others likewise accurately reflect in words or substance that these statements were made as reported, according to by own personal knowledge. This affidavit in no wise represents my own personal views on the events of the case.

(S.) Milton Lewis.

Sworn to before me this 5th day of December, 1952.

[fol. 214] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDWARD RANZAL IN REPLY TO OPPOSITION—December 5, 1952

STATE OF NEW YORK,
County of New York, ss.:

Edward Ranzal, being duly sworn, deposes and says:

I am a newspaper reporter employed by the New York Times, a newspaper published and circulated in and about the City of New York.

I was employed by the said newspaper in the capacity aforesaid since at least March, 1950. I wrote for my employer the following stories which concern themselves with the above-entitled case:

1. New York Times, August 18, 1950, page 7 (Exhibit VIII-A-18);
2. New York Times, August 19, 1950, page 1, 6 (Exhibit VIII-A-19).

The contents of these stories accurately represent the facts stated therein and any statements contained in these stories attributed to public officials or others likewise accurately reflect in words or substance that these statements were made as reported, according to my own personal knowledge. This affidavit in no wise represents my own personal views on the events of the case.

(S.) Edward Ranzal.

Sworn to before me this 5th day of December, 1952.

[fol. 215] AFFIDAVIT OF GEORGE TROW IN REPLY TO OPPOSITION—December 4, 1952

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States of America against Julius Rosenberg and Ethel Rosenberg

STATE OF NEW YORK,
County of New York.

George Trow, being duly sworn, deposes as follows:

To the best of my knowledge the story appearing in The New York Post, a newspaper published and circulated in New York City, on Aug. 18, 1950 under my byline is an accurate one. It was based on accounts given me by reporters and the reports of wire services and is, of course, subject to human error.

(S.) George Trow.

Sworn to, before me this 4th day of December, 1952.
(S.) Arthur J. McGuire.

Arthur J. McGuire, Notary Public, State of New York. Qualified in Queens County. No. 41-7865100. Certificate Filed With Queens County Clerks and Registers, New York County Clerks & Registers, Bronx County Clerks & Registers. Commission expires March 30, 1954.

[fol. 216] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—SOBELL CASE—November 19, 1952

Upon the annexed affidavit of Howard N. Meyer, sworn to the 19th, day of November 1952, and upon the prior proceedings herein, let the United States Attorney show cause before this Court at a Criminal Term thereof, to be held in Room 318 United States Court House, Foley Square, New York City, on the 21st, Day of November, 1952, at

19:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made (28 U. S. C., Sections 1651 (a), 2255), pending determination of an application for relief under 28 U.S.C. 2255, restraining the Attorney General or his representatives, from transferring defendant from the Federal Detention Headquarters, New York City; and, sufficient cause appearing for this order, it is

Ordered that pending the hearing and determination of this motion, the Attorney General or his representatives be, and they are hereby stayed from transferring the defendant from the Federal Detention Headquarters, New York City, and it is further

Ordered that service of a copy of this order and the affidavit on which it is made, on the United States Attorney, on or before November 19th, 1952, by 3:00 p. m., shall constitute sufficient service thereof.

(S.) Edward Weinfeld, United States District Judge.

Dated: November 19th, 1952.

"Memo Endorsed."

Motion argued. Stay continued until end of day on November 25, 1952.

[fol. 217] In United States District Court

[Title omitted]

Affidavit of Howard N. Meyer—Sobell Case—November 19, 1952

State of New York,
County of New York, ss.:

Howard N. Meyer, being duly sworn, says:

1. I am an attorney and a member of the bar of this court, and of counsel to Harold Phillips, Esq. and Edward Kuntz, Esq., attorneys of record for the defendant.

2. The defendant was convicted in this court, after a trial on his plea of not guilty, of conspiracy to commit espionage (Form r U.S.C. Sec. 34) and by judgment of

April 5th, 1952, sentenced to thirty years imprisonment. (I. R. Kaufman, D.J.) Judgment was affirmed by the Court of Appeals, Frank, C.J., dissenting, Feb 25, 1952, petition for certiorari denied October 13th, 1952 (Black J. dissenting) and petition for rehearing denied November 17th, 1952.

3. Defendant is presently in custody and detained at the Federal Detention Headquarters, West Street, New York City. He has been in custody at all times since his arrest in August, 1950.

4. I have been retained and instructed by defendant to commence, forthwith, a proceeding under 28 U.S.C. Section 2255, to test, by collateral attack, the validity of his conviction and sentence. I am convinced that substantial grounds exist for such application.

5. I have been counsel of record for defendant, in the Supreme Court, on his petition for certiorari. When I was in Washington on October 28th, 1952, to file his petition for rehearing with the Court, I called upon Mr. James V. Bennett, Director of the Federal Bureau of Prisons, to request that petitioner not be transferred forthwith upon [fol. 218] denial of rehearing, to a Federal Penitentiary. I stated that the petitioner desired to remain in New York to consult with me, and I desired him to remain, so that I could consult with him, pending consideration of the application which, I told Mr. Bennett, I intended making under 28 U.S.C. Sec 2255. He told me that he could make no firm commitment, but indicated that petitioner would be kept in New York at my request, for ten days to two weeks after the return of the mandate, should the petition for rehearing be denied.

6. Since that time I have been working assiduously, and in good faith, on the preparation of papers on the application under 28 U.S.C. Section 2255. It has, however, been a physical impossibility to complete such papers by this date, since, among other things, they have required intensive research among voluminous newspaper photostats bearing on whether pre-trial publicity deprived petitioner of the possibility of a fair trial, before an impartial jury, in March of 1951. I expect, however, to be prepared to file my papers with this Court not later than November 28th, 1952.

7. I was informed yesterday that Mr. Bennett has reconsidered his statement to me of October 28th, 1952, and directed that defendant be transferred from West Street Detention Headquarters, to the Federal Penitentiary at Alcatraz, "expeditiously." Mr. Frank Kenton, parole officer at West Street, stated to me this morning that he construed this to mean this week. I called Mr. Bennett by long distance telephone this morning, and he confirmed that he had given such instructions. He declined to alter them despite the fact that I requested only that Sobell be kept in New York long enough—one week—for me to complete preparation and submission of my papers on the application, together with the necessary order to show cause.

8. I informed Mr. Myles Lane, of the foregoing facts this morning. He said that he "could not" and "would not" interfere.

9. Petitioner is entitled to make his application as of right, under Section 2255. He is entitled to the right of [fol. 219] counsel which includes consultation, in presenting his application. The decision of Mr. Bennett to transfer him forthwith is an arbitrary interference with petitioner's right. The United States cannot be injured by the granting of this application, since petitioner is already in custody. The petitioner on the other hand, will be irreparably injured if he is deprived of the right to consult with counsel -ntil his application is disposed of by this court. I would have preferred to make the present request for a stay on the full papers which I am preparing, but have been prevented from doing so by Mr. Bennett's reversal of position.

10. No previous application has been made for this relief.

(S.) Howard N. Meyer.

Sworn to before me this 19th day of November, 1952.

Bernard Davis, Notary Public, State of New York. No. 41-9874000. Qual. Queens Co. Clerk and Register. Filed New York Co. Clerk and Register. Commission expires March 30, 1953.

[fol. 220] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF HOWARD N. MEYER—SOBELL CASE—November 20, 1952

STATE OF NEW YORK,
County of New York, ss:

Howard N. Meyer, being duly sworn, deposes and says:

I make this affidavit, to supplement my affidavit of November 19th, 1952, in support of a motion for a stay of defendant's transfer.

I request that petitioner remain in New York until at least Tuesday, November 25th, 1952, so that he can sign the petition under Section 2255, which I expect to present to the Court no later than that date.

When the petition is presented, I shall renew my request that he remain here for further consultation, pending the filing of the U. S. Attorney's traverse, if any, and the hearing and determination of the petition.

In this connection, I respectfully refer the court to the only pertinent authoritative appellate discussion I have found of the fourth paragraph of Section 2255:

> "We do not think it was intended by such provision to give the court an absolute discretion . . . where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally in the exercise of a sound discretion, the Court should require the production of the prisoner". *Barrett v. Hunter,* 180 F. (2d) 510, 514 (C. A. 10).

The Court thus recognized the fairness and appropriateness of the petitioner's presence, once the claim was ruled to be material and substantial enough to require a hearing, even if his testimony was not thought to be required.

(S.) Howard N. Meyer.

Sworn to before me this 20th day of November, 1952.

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—SOBELL CASE

Upon the annexed petition of Morton Sobell, dated the 24th day of November, 1952, and the affidavits of Howard N. Meyer, sworn to the 19th, 20th and 24 day of November, 1952, and upon the file and records of this case, let the United States Attorney show cause before this Court, at a Criminal Term thereof to be held at the Court House, Foley Square, on the 26th day of November, 1952, at 10:30 a. m. on the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made, pursuant to 28 U. S. C. 2255 vacating and setting aside the judgment of conviction of Morton Sobell, defendant and petitioner herein, or in the alternative, granting a prompt hearing on this motion, and, sufficient cause appearing for this order, it is

Ordered that service of a copy of this order and copies of the papers on which it was made, on the United States Attorney, on or before November 25, by 12:00 noon, 1952, shall constitute sufficient service thereof, and it is further

Denied without prejudice renewal before the Court hearing the motion. See memorandum attached.

Edward Weinfeld, United States District Judge.

[fol. 222] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO VACATE SENTENCE—SOBELL CASE—November 24, 1952

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The Petition of Morton Sobell respectfully shows:

1. That he is unjustly and illegally detained and imprisoned by the Attorney General of the United States by color of authority of the United States.

2. That petitioner was taken into custody at Laredo, Texas, on August 18, 1950, and has at all times since that date been held in custody of the Attorney General through his several agents and employees; that after a purported trial commencing March 8, 1951, and concluding March 29, 1951, before I. R. Kaufman, U. S. D. J., your petitioner was convicted of a charge of conspiracy to violate the Espionage Act (former Title 50, Section 34, U. S. C.); that on April 5, 1951, he was sentenced to a term of imprisonment of thirty years, the maximum term provided by statute; that he is presently detained under color of said judgment and sentence, all as more fully set forth in the files and records of this case.

3. That your petitioner's aforesaid conviction was affirmed by the Court of Appeals for the Second Circuit on February 25, 1952, Judge Frank dissenting, petition for certiorari denied by the United States Supreme Court October 13, 1952, and petition for rehearing denied November 17, 1952.

4. Your petitioner now makes the claim that the sentence imposed on him was imposed in violation of the Constitution and laws of the United States, and that the sentencing court was without jurisdiction to impose the sentence, and that [fol. 223] the sentence imposed was the product of such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack on the several grounds more particularly set forth in the accompanying affidavit of one of petitioner's attorneys, Howard N. Meyer, sworn to November 24, 1952, to wit:

a. That the processes of this court were abused during the pendency of this trial by the deliberate bringing about, by the prosecution, of the indictment and arrest of one William Perl, at a time calculated to produce grossly prejudicial newspaper publicity concerning both the event of the indictment and extra judicial statements relating to it, all of which necessarily had the effect of unduly influencing the jurors sitting in petitioner's cause, the full character of the abuse, however, not having been discovered by or discoverable on behalf of petitioner until many months after petitioner's trial.

b. That by a constant course of conduct prior to petitioner's trial, the Attorney General, the U. S. Attorney and their Assistants, and the Director of the Federal Bureau of Investigation and his agents, together collectively referred to herein as the Prosecution, engendered an atmosphere hostile to this petitioner and pre-disposed the community from which the jurors were drawn to the belief that petitioner was an "atom spy" and a "member of the Klaus Fuchs spy ring" although at all times said agencies must have known that such characterizations were false, had no evidence to support them, produced none at the trial, and were seeking thereby wrongfully to insure petitioner's conviction.

c. That your petitioner and his co-defendants were so reviled and maligned and the subject of such constant and spectacular hostile newspaper and radio publicity in openly and covertly feeding prejudicial material to the press, that it was impossible for them to receive a fair trial before an impartial jury in March of 1951, and as a result, the purported trial was but a legal gesture to register a verdict [fol. 224] dictated by popular preconception.

d. That evidence of "treachery and general intent to betray" was offered on the trial of petitioner in the guise of proof of specific intent to furnish secret military information, and hence the conviction based on an unconstitutional application of the Espionage Act, in conflict with the treason clause of the Constitution.

3. The prosecuting authorities k*k*nowingly used false testimony to bring about petitioner's conviction.

5. Petitioner is unjustly, unlawfully and illegally confined, in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States and in violation of his immunities under the Treason Clause (Ar. III, Section 3) of the Constitution.

Wherefore, petitioner prays that an order be made and entered herein vacating and setting aside the judgment of conviction and discharging him from custody; pending the hearing and determination of this petition, he respectfully requests that he be retained within the jurisdiction of this

court so that he may be free to consult with counsel, and free to testify, if need be, at the hearing.

(S.) Morton Sobell, Howard N. Meyer, Harold M. Phillips, Eward Kuntz, Attorneys for Petitioner, 205 West 34th Street, New York 1, New York.

Dated Nov. 24, 1952.

[fol. 225] In United States District Court

[Title omitted]

Affidavit of Howard N. Meyer in Support of Motion (Sobell)

State of New York,
County of New York, ss:

Howard N. Meyer, being duly sworn, deposes and says:

1. I am counsel for the defendant, Morton Sobell, and make this affidavit in support of his petition under 28 U. S. C. Section 2255, for an order vacating and setting aside a judgment of this Court of April 5, 1951, adjudging him guilty of conspiracy to commit espionage (former Title 50, Section 34, United States code) and sentencing him to imprisonment for a term of thirty years. The purpose of this affidavit is to set forth in some detail the matters dehors the record which render the judgment herein subject to collateral attack.

2. The claim, as set forth in the petition, is made on five grounds, each of which is considered to be, independently and separately sufficient to justify the relief sought. While the first three grounds are presented separately, it is also requested that the first and second be deemed incorporated in the third; taken together, the essence of the three is that petitioner has been denied the substance of a fair trial by conduct of the prosecuting officials of the United States Department of Justice both prior to and during petitioner's [fol. 226] trial calculated to bring about a community prejudgment of guilt, and to make it inevitable that the jurors trying the cause would bring in a verdict based not on evi-

dence presented at the trial, but on matters constantly brought to their attention, at the instigation of the prosecution, outside the courtroom.

If the allegations of this affidavit should be uncontroverted, or if the proof at the hearing should support them, the conclusion will be unavoidable that the trial herein was but a legal gesture to register a verdict already dictated by popular preconception; where such preconception is produced by conduct of the prosecution in specific relation to this case, the result is as incompatible with "any civilized conception of due process of law" as the knowing use of perjured testimony (*Mooney v. Holohan,* 294 U. S. 103) or the overt domination of a trial by a vengeful mob (*Moore v. Dempsey,* 261 U. S. 86).

Counsel is aware that this petition imposes on the Court a grave responsibility; a responsibility that will be discharged in the light of the proposition that it is more important to the security and liberty of our country that prosecuting officials be held to a course of conduct which will show due regard to the rights of an accused under the Fifth and Sixth Amendments, than that the government should be put to the "inconvenience" of seeing to it that defendants, however serious the nature of the charge against them, are tried solely on evidence produced in a courtroom.

[fol. 227] 3. The petitioner Sobell was charged with having conspired with certain named co-defendants to transmit information relating to the national defense of the United States, to the U. S. S. R., with intent and reason to believe that such information would be used to the advantage of that country.

Such an accusation, it is obvious, is of such a passion-rousing character as to have required the most scrupulous and earnest performance by the United States Attorney of his admitted (R. 1510) "duty to refrain from improper methods calculated to produce a wrongful conviction". (e.g. *Berger v. United States,* 295 U. S. 78) Not only was there an absence of such restraint in this case, but there was a course of conduct, in many months prior to the petitioner's trial, which was calculated to exacerbate an existing heated and disturbed public sentiment, topped off by an extraordinary event during the trial—the arrest and

indictment of one William Perl—the full significance of which did not become evident until many months after the trial itself was concluded.

The Perl Incident

"References (R. —) are to the printed record of proceedings as certified to and printed for the purpose of petition for certiorari in the Supreme Court.

4. The prosecution's case against petitioner and his co-defendants rested solely on the dubious testimony of self-confessed spies (R. 1648) and an admitted perjurer. (R. 278, 369) The determination of the issues at stake involved decision by the jury as to the credibility of witnesses. (R. 1648). The principal witnesses upon whose credibility the prosecution staked its case were Max Elitcher (a classmate of this petitioner and of Julius Rosenberg) and David and Ruth Greenglass, the brother and sister-in-law of Mrs. Rosenberg. The trial had begun on March 6th, 1951; the [fol. 228] actual taking of testimony, through the witness Elitcher, on March 8th, His examination was concluded on March 9th, and he was followed by David Greenglass, who continued on the stand through March 14th, 1951, when he concluded, to be followed by Ruth Greenglass who remained on the stand until mid-morning of March 15th, when, after two minor witnesses, she was followed by Harry Gold. The testimony of Gold had no direct bearing on the guilt or innocence of any defendants on trial; only if the Greenglasses and Elitcher were to be believed would Gold's testimony have had valid circumstantial significance.

5. At this crucial moment there occurred the following events—not of record in the instant case—the full motivation and true character of which could not be apparent until many months after the conclusion of petitioner's trial. On Tuesday, March 13th, 1951, the Grand Jury which had indicted petitioner and his co-defendants returned an indictment for perjury against William Perl. (Crim. 145/43) The Indictment was ordered sealed by Judge Goddard, then presiding in the principal criminal part of this Court. The indictment was nevertheless taken before Judge I. R. Kaufman, who was then actually engaged in presiding at the

trial of the instant case, and ordered opened by him on March 14th. At the same time, Judge Kaufman signed the bench warrant for the arrest of Perl. The indictment against Perl charged him with having testified falsely *over six months before,* with respect to his acquaintanceship with (1) petitioner Sobell, (2) his co-defendant Julius Rosenberg, (3) Helene Elitcher (the wife of the perjurer-witness, Max Elitcher) and (4) two individuals, Ann and Michael Sidorovich—whose name figured prominently in the testimony of David Greenglass (e. g. R. 445-6).

6. The indictment and arrest of Perl—he was arrested on the evening of March 14th, 1951—had the effect such an event could only have been calculated to have. It resulted in sensational newspaper, radio and television publicity on [fol. 229] March 15th, of a character not ostensibly having to do with the trial of petitioner and his co-defendants—and hence not even within the purview of prior admonitions by the trial judge (even if it be assumed that such admonitions are ever taken seriously) against reading "about *this* case" in the newspapers. (K. G. R. 114). The publicity appeared on the front page of *every* New York City morning newspaper on March 15th, 1951, including the tabloids, whose front page space is at a premium. It was prominently displayed in every afternoon newspaper. The sinister character of this publicity—not in the record on the trial—becomes apparent when compared with what is to be found in the record. The full quality and character appears in the photostats of the relevant newspapers, which, as annexed to the petition of the defendant Rosenberg of November —, 1952, signed by Emanuel H. Bloch, Esq., I beg leave to have incorporated herein in their entirety and treated as an Exhibit hereto. The New York Times, for example, carried a two-column page-one headline (sensational treatment, for that newspaper, of the story of an arrest of an otherwise unknown person) "Columbia Teacher Arrested: Linked to Two on Trial as Spies". Two separate stories appear in the parall-ed columns under the two-column head: the one, relating to the previous day's testimony at petitioner's trial—which the jurors might not have read; the other, concerning Perl, which the jurors could have felt entirely free to read, and headed "Physicist Called Perjurer in Denying that He Knew Rosenberg and

Sobell". The text of the story that follows contains the following statements attributed to the United States Attorney, who has never denied making them:

> "Mr. Saypol said also that Perl had been listed by the Government as a potential witness in the current atomic espionage trial. *His intended role on the stand, Mr. Saypol added, was to corraborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses in the trial*". (Emph. supp.)

It is difficult to believe that such a quotation was falsely attributed to Mr. Saypol. It is even more difficult to under- [fol. 230] stand how it has remained unconsured.

The standard was laid down long ago, as to such conduct, when the court said, in *United States v. Ogden*, 195 Fed. 371 (D. Pa. 1900):

> "I need hardly say that the publishing of such comments during the course of the trial was a flagrant impropriety. If the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offense punishable by fine and imprisonment would have been committed; and it is little less blameable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal".

Whatever the reason for the prosecutor's immunity in the present case, it is obvious, from the narrative of the events of the trial and the precise timing of the publication, how any doubts that any jurors might have had concerning the dubious ascomplice testimony tendered by Mr. Saypol at the trial, could have been resolved, for the jury, dehors the record and cont-ary to law*y*, by this type of "corroboration".

The prominence of the publication, and the fact that the jury dispersed each day in the present trial, makes it inevitable that the remarks were seen and discussed by the jurors.

> "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared

in daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications". (Meyer v. Cadwalader, 49 Fed. 32, 36).

7. Mr. Saypol was not alone in using the occasion of the Perl arrest to send extra-judicial information to the jury, via the press and radio. Mr. J. Edgar Hoover felt impelled to announce, according to the Times, that Perl's father "was a native of Russia" and that Perl "had been under investigation since shortly after the arrest of Harry Gold".

[fol. 231] 8. The files and records of this Court support the claim that the circumstances of the Perl indictment, the unsealing of the indictment, the arrest of Perl, and the press statements of the prosecution in connection with the arrest, must be scrutinized in a hearing under Section 2255 to determine whether the conviction in this case was not brought about in a manner in conflict with the Fifth and Sixth Amendments to the Constitution of the United States. As mentioned above, the indictment occurred over six months after Perl's allegedly false testimony was given. The crime of perjury is a serious one; *yet eighteen months have elapsed since the indictment*, and Perl has not only not been brought to trial; the United States Attorney's office has most vigorously opposed efforts of Perl's counsel to give that defendant a trial.

9. At the time of Perl's arraignment, March 15th, 1951, as reflected by stenographic minutes of proceedings before Judge Goddard on file in this Court (Crim. 135/43) John M. Foley, Assistant United States Attorney (who was also counsel of record for the government in the trial of petitioner stated:

> "The government is ready to proceed on April 2nd. However, counsel for the defendant has advised me that he is going to be engaged through the 8th of April, and he would not be ready for trial until the 16th or 17th of April. The Government had no objection to the date defense counsel suggests".

[fol. 232] The government did not, however, proceed on April 17, 1951. According to Perl's uncontradicted statements in an affidavit in support of a motion brought on by order to show cause signed June 3rd, 1952, in an effort to force a trial:

> "On June 4, 1951, the trial date was set for June 18, 1951. At the point both myself and my counsel were actually ready for trial".

Thereafter, he says, trial was successively adjourned to October 4, 1951.

> "Finally on that date, the case was marked off the calendar by the United States Attorney".

The United States Attorney's office, which, as noted above, declared during the pendency of petitioner's trial, that it was "ready to proceed on April 2nd", (1951) fought tooth and nail against going to trial in June of 1952. It went to the length of filing an affidavit incorporating an earlier affidavit of May 26th, 1952, by Robert Martin, assistant United States Attorney, claiming:

> "The reason that the case has not been brought to trial to date is because, among other reasons which may not properly be disclosed at this time, the United States Attorney believed it desirable to have all aspects of the Rosenberg and Sobell prosecutions completed before commencing prosecution in the related cases. Further, Myles J. Lane, the United States Attorney is presently engaged in litigation of considerable importance in the case of *U. S. v. Elizabeth G. Flynn*, et al, and has just completed prosecution in the case of *U. S. v. Frank Costello*. Accordingly, the case cannot possibly be brought to trial until the fall of 1952".

and then stating, in the new affidavit of June 9, 1952:

> "The offense charged in the indictment in this case is one of the most serious import. The defendant is a physicist and a leading specialist in aerodynamics. He has done work in fields of top military secrecy. He is charged with perjury in that he denied knowing, before

a Grand Jury investigating espionage, persons who have subsequently been convicted of engaging in espionage on behalf of the Soviet Union. The prosecution in the espionage case, that against Julius Rosenberg, has not been completed and is presently awaiting possible application for review by the Supreme Court. The United States Attorney has deemed it unwise to proceed further and reveal the proof in this perjury case until the Rosenberg case and related matters have been concluded".

[fol. 233] The implication that the trial of Perl's indictment would be a difficult one, and hence not readily triable by an assistant U. S. Attorney, is belied by the statement of assistant U. S. Attorney Foley, on March 30th, 1951, in stenographic minutes on file in this court, in arguing against a motion for a bill of particulars.

"If this were an unusually difficult case, if it was a complicated factual situation, if it required great pains in preparing for trial, then I could understand the defense counsel's predicament. I would not agree with their contention, however, *But this is such a* simple case your Honor, I do not see why any unusual allowance should be made in a bill of particulars".

10. The claim that the "processes of the court were abused" obtains additional support from the inference which can be drawn from the foregoing, that it was never seriously intended to bring Perl to trial, when the prosecution sought his indictment. That inference, serious as its implications may be, is supported by the timing of the indictment, and the circumstances set forth above. An alternative inference, at the present juncture, in view of the statements in the Martin affidavits, is that the prosecution is aware that a trial of Perl, if held while the Rosenbergs are alive, will necessarily bring out evidence or facts which have been hitherto suppressed, which will demonstrate the innocence of petitioner and his co-defendants. But, if that is the case, a right to relief under Section 2255 exists, since the knowing suppression of such facts is as much a violation

of due process of law as the knowing use of perjured testimony.

11. Over and above the injury to all defendants, arising out of the Perl incident, is a particular injury to petitioner which may be stated as follows: there was a serious and substantial question on the trial of the indictment herein, as to whether the proof showed the *single* conspiracy charged by the indictment, or whether it showed two separate alleged [fol. 234] conspiraci-s, *the one* dealing with atomic espionage, allegedly between the Rosenbergs and others, in which the trial judge acknowledged (R. 1620) that Sobell did not participate, and *the other* allegedly between Julius Rosenberg and Sobell, having to do with other, unidentified national defense information. This question was so serious and substantial, indeed, as to have evoked from Judge Frank of the United States Court of Appeals a dissent from the affirmance of the conviction of Sobell, on the ground that, if in fact two conspiracies were proved, "then prejudicial error has been committed for Sobell was jointly tried with major atomic energy spies whose acts and declarations were held binding upon him" (R. 1664-5; 195 F. (2d) st. p. 600). The majority of the Court of Appeals, in affirming, seems to have believed that "the jury could and did reasonably find" that there was a single conspiracy. And the Solicitor General, in opposition to certiorari, contended that the jury had so found, (Br. Opp. 48-50) and did not deny that it was a jury question.

But on this issue, so much in doubt that Judge Frank dissented from the affirmance of petitioner's conviction, the Perl incident and attendant prejudicial publicity incited by the prosecution, was calculated to bring improper pressure to bear on the jury. Through the indictment of Perl there was emphasized and through the publicity there was reemphasized the existence of a claimed nexus between Perl and Sobell, and between Perl and Ann and Michael Sidorovich, individuals never testified to as having had anything to do with Sobell, but whose alleged role in the evidence at the trial was confined to alleged dealings in atomic espionage between Julius Rosenberg and David Greenglass and Harry Gold. Thus there was thrown into the scales an entirely improper and extraneous instrument of persuasion,

calculated to produce an unfair resolution of the question whether the testimony concerning Sobell related to a *sep-* [fol. 235] *arate* agreement, or whether, (as Judge Frank states the issue) "he became a member of the Rosenberg-Greenglass-Gold conspiracy".

Pretrial Publicity Particularly Unfavorable to Sobell

12. Apart from the Perl incident, in the pre-trial period and during the period of the trial, defendant Sobell was subjected to a most prejudicial sort of prosecutor-incited hostile publicity, which he and his counsel were powerless to challenge before the trial because of concealment, by the prosecution of the particulars of the case against him. The nature and character of the prejudice is best demonstrated in the light of the fact that at the time petitioner was sentenced it was acknowledged by the trial judge that "*The evidence in the case did not point to any activity on your part in connection with the atom bomb project*". (R. 1620)

The indictment on which the trial of petitioner and his co-defendant was had did not reveal this fact; and the prosecution insistently opposed his trial counsel's efforts, by way of proceedings for a bill of particulars, to get some enlightenment as to the nature of the charge against him. As Judge Frank said for the Circuit Court:

> "Sobell's counsel argued that on the basis of the indictment and information obtained from an unsuccessful attempt to get a more enlightening bill of particulars, it was impossible for Sobell to ask for a severance earlier to these grounds. Sobell's position seems well taken, although it is not necessary to decide any question of waiver involved in his failure to reque at severance." (R. 1664)

The prosecution, however, must at all times have been aware of what the trial judge acknowledged, as quoted above; that petitioner had nothing to do with atomic espionage. Yet, persistently and pervasively, from the moment of petitioner's arrest, they sought to impress on the minds of the community from which the jurors were drawn the belief that petitioner was an "atom spy". For [fol. 236] example, the headline, of a sensational character,

reporting announcements of the Director of the F. B. I. and the United States Attorney pertaining to Sobell's arrest—the first publicity which his name and personality received—were of the following nature: New York Journal American, August 18th, 1950, half banner, front page head "Arrest N. Y. Man as Reds' A-Spy",* juxtaposed with a large photograph of petitioner captioned "Morton Sobell, Accused Spy". The New York Daily News (August 19, 1950) headlined the story, across three-fifths of a page, "Fleeing Radar Expert Nabbed as Atom Spy", with petitioner's name set forth in large type in the "lead" sentence of the story. The New York Times in its prominent page one story quoted U. S. Attorney Saypol as follows: "Mr. Saypol said that Sobell had many dealings with Rosenberg in the conspiracy to supply Russia with atomic secrets".

This accusation, which must have been known to the prosecution to be false, was repeated in various forms, both directly and indirectly, in characterization, prior to the trial, of Sobell as an alleged "atom spy". E.g.: New York Journal American, August 19th, 1950: "U. S. to Bring 8th Atom Spy Suspect Here" (p. 1) Journal American August 20th, 1950, photo caption, "Mrs. Sobell . . . visited her atom spy suspect husband; New York Post, August 20th, 1950 "N. Y. Man Held as Eighth A-Spy, awaits Return"; New York Daily News August 25th, 1950 "8th Atom Spy Suspect Held in 100 G's bail"—juxtaposed with a 4"x2" photo of Morton Sobell. "(Morton Sobell) was arrested in Laredo, Tex., by F. B. I. agents yesterday as a member of the Klaus Fuchs international atomic spy ring" (Daily [fol. 237] Mirror, August 19th, 1950, p. 2); "A-Spy Suspect (Morton Sobell) to be Brought Here" (Daily Mirror August 22nd, 1950).

The prejudicial effect of the foregoing was refreshed and revivified in the immediate pre-trial period. On March 1st, 1951, the New York Times headlined "Spy Trial to Hear Three Atom Scientists" and referred to "three persons (i. e. the Rosenbergs and Sobell) accused of transmitting

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* By this time it had become common knowledge among newspaper readers that "A-bomb- meant "Atomic bomb" and "A-spy" meant "Atom spy".

atomic secrets to Russia in war time". The Daily News headlined on March 1st, 1951, "U.S. has 97 witnesses in A-trial stock pile" and declared that the Government would "attempt to convict Julius and Ethel Rosenberg and Morton Sobell on charges of conspiring to pass on atomic secrets to Soviet Russia during wartime." On March 6th, 1951, the Daily News, headlining "Hint U. S. Seeks Death for three on Trial Today" specifically named "Morton Sobell" as being charged with "actually plotting to feed atomic secrets to Russia". The New York Post on March 6th, 1951, published a photograph of petitioner captioned "Morton Sobell, accused of atomic espionage, enters Court", juxtaposed with a story referring to the "first atomic spy trial in history" and headlined "Three A-Spy Suspects to go on Trial".

The day-by-day reportage of the trial was uniformly of this pattern. It would be cumulative to set that forth here in view of the fact that complete documentative may be found in the Rosenberg petition; but is of interest as reflecting the prejudicial confusion produced by the pre-trial publicity, to examine the reference to the testimony of David Greenglass, self-described atom spy, as reported in the New York Post for March 12, 1951:

> "The former army sergeant whose testimony begun Friday, gave a detailed "cloak-and-dagger account of his dealings with Julius Rosenberg, his wife Ethel, and Morton Sobell, electronics engineer. The three, Greenglass testified, conspired with him to steal top secrets from the government and transmit them to Moscow".

[fol. 238] There is not a scintilla of such evidence, or any evidence in the case, by *Greenglass*, having to do directly or indirectly with Morton Sobell.

It is, of course, no answer, to all this that the indictment charged a "single" conspiracy, and that an alleged co-conspirator has a constructive, albeit fictitious, responsibility for acts of his co-conspirators. The numerous condemnations of petitioner as an "atom spy"—in many instances alleging direct participation—were not accompanied by cautionary instructions, or addressed to an audi-

ence learned in the entangling niceties of the law of conspiracy.

Nor is it an answer that the jury was instructed not to convict unless they "believed" the testimony of Max Elitcher. (R. 1560) The purpose of what has been set forth in this affidavit has been to show how the jury was brought, by unconstitutional means, not of record and hence not appealable, to believe a witness whose credibility was so suspect.

The prejudice created by such unjust denunciations as "actually plotting to feed atomic secrets to Russia", (supra) was compounded, at every stage, by the injection of the equally false accusation that Sobell had not only conspired concerning the atom bomb, but had done so as a co-conspirator of Dr. Klaus Fuchs, who had been referred to as the "most notorious spy in recent history" (341 U.S. 494 at p. 548). While the court may be sufficiently aware, so as to be able to take judicial notice, of the prejudicial character of an unjustified coupling of an individual with Klaus Fuchs, it may be well to recapitualte the following historical facts. During the entire post-war period—from 1945 to 1950—two most disturbing series of events, to every American, particularly urban residents, were the increasing general deterioration of relationships between the United States and the Soviet Union, and the parall-ed breakdown of efforts to establish international control of [fol. 239] the use of the horrible atomic bomb for military purposes. The tragic and devastating effects of the two military uses of the atomic bomb at Hiroshima and Nagasaki were common knowledge, and the sources of a constant "state of intense public alarm" (Blackett, Fear, War and The Bomb, 1949). Superimposed on this background, shortly after the revelation by President Truman of an atomic explosion on Soviet territory, came the fateful public controversy as to whether the United States should proceed to manufacture a weapon—the hydrogen bomb—(which came to be known as the "hell bomb")—which dwarfed the hideous atomic bomb in the same proportion as that weapon had overshadowed every military weapon previously invented. On January 31st, 1950, the President directed that work with the hydrogen bomb proceed—and the public was told that "the new bomb would fuse atoms—

with a power 100 to 1000 times greater than the improved fission bombs that have been developed since the Japanese cities were struck" (N.Y. Times, Feb. 1, 1950).

Within three days after this decision was made, with all its attendant fanfare came the shocking revelation of the arrest, by the British authorities, of Dr. Klaus Emil Julius Fuchs, on charges of espionage. "British Jail Atom Scientist as a spy after Tip by F.B.I.; *He Knew of Hydrogen Bomb*" (N.Y. Times, Feb. 4, 1950). Dr. Fuchs, at the very least "had certain basic information dealing with the hydrogen bomb development and was thus in a position to pass it on to the Russians" (id), at the worst, if the Journal American's quotation attributed to Dr. H. H. Bethe be taken at face value "All H-Bomb secrets Gone"; "America's closely guarded secrets on hydrogen bombs are now "no longer secrets'- one of this country's foremost physicists, Dr. H. H. Bethe of Cornell University declared yesterday" (Journal American February 5th, 1950). The themes of the vast destructiveness of the hydorgen bomb, and the asserted role of Fuchs in transmitting hydrogen secrets to the Russians, were played over and over, with variations in the following weeks.

[fol. 240] 13. In the context just set forth, an accusation of association with Fuchs was one that should hardly have been lightly made, even assuming it to be permissible for a prosecutor to make such accusation other than before a grand or petit jury. Yet this petitioner and his co-defendants were repeatedly so characterized—although the prosecution ultimately disclaimed (but outside of the hearing of the jury (R 836-7) any intention to have Sobell and his co-defendants characterized as co-conspirators of Dr. Fuchs. This, however, did not prevent the incitations * of such publicity as the following: "Morton Sobell, 33 year old radar expert and eighth American suspect nabbed in the Klaus Fuchs international atom spy ring" (Daily News, August

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* I have no personal knowledge as to whether the allusions to Fuchs were prosecutor-inspired, but believe that on their face, and in view of their timing in relation to the arrest, the newspaper stories permit of no inference other than that the source of the characterization was the prosecutor.

27th, 1950); "Radar Expert Indicted in Fuchs Ring" (Daily News, October 11th, 1950); "(Sobell) was arrested as a member of the Klaus Fuchs atomic spy ring" (Journal American, August 19, 1950); "The F.B.I. today announced the arrest at Laredo, Texas, of Morton Sobell of New York . . . the eighth accused spy to be apprehended as a result of the Klaus Fuchs-Harry Gold atomic espionage case" (Journal American August 18th, 1950: "A 33 year old radar expert was in Federal custody today awaiting his return to New York to face charges that link him with the Klaus Fuchs international spy ring. . . . Sobell, the eighth American arrested in connection with the Fuchs spy apparatus. . . . Sobell was the second alleged member of the Fuchs ring to face legal proceedings this week. *Justice Department* spokesmen in Washington linked him with Julius Rosenberg. . . ." (New York Times, August 20th, 1950). "Nab 4th Man (Rosenberg) in Atom Spy Ring *Linked by F.B.I.* to Gold-Fuchs Gang" (Daily Mirror, July 18th, 1950); "the spy ring which fed information to the Russians through Dr. Klaus Fuchs, top British atomic spy" [fol. 241] (N. Y. Post, July 19th, 1950): "Morton Sobell, the latest suspect bagged in the Klaus Fuchs atomic spy ring roundup" (Journal American, August 19th, 1950); "Sobell . . . seized as a member of the Dr. Klaus Fuchs atomic spy ring" (Daily News, August 19th, 1950); "Morton Sobell, accused of belonging to the Klaus Fuchs spy ring which fed atomic secrets to Russia", (Daily Mirror, August 25th, 1950, p. 10); "it was expected (Greenglass would turn Government witness at the trial of his co-conspirators in the Klaus Fuchs atomic spy ring. . . . The Fuchs spy plotters have been described as those mainly responsible for the fact that Russia now has the atomic bomb" (Journal American, October 18th, 1950); "*Hoover's announcement of Rosenberg's arrest declared* that the suspect was part of the ring that included Fuchs, the British nuclear physicist and three other Americans—Gold, David Greenglass and Alfred Dean Slack" (Journal American July 18th, 1950); and finally "Atom Spy Trial Opens—Charge Link to Fuchs and Gold" "All are charged specifically with espionage and conspiracy as key figures in the notorious Klaus Fuchs-Harry Gold spy ring, whose success the Gov-

ernment claims cost the United States five years in armament advantage" (Journal American March 6, 1951).

All this, despite the fact that it was ultimately conceded (but in the absence of the jury) that there was no claim of conspiracy by Sobell, or Mr. or Mrs. Rosenberg, with Fuchs! (R. 836-7).

The constant reference to Fuchs in the pre-trial publicity may not have been primarily motivated by a desire to prejudice the defendants. The motive may have been laudable or it may have not, for repeatedly and unjustly charging that the defendants were co-conspirators with Fuchs. The *result* is determinative. "The prejudicial effect . . . in being brought to trial in the hostile atmosphere engendered by all this pre-trial publicity, would obviously be as great, whether such publicity were generated by the prosecuting [fol. 242] officials or by a congressional committee hearing". (Magruder, C. J., for the Court of Appeals, First Circuit, *Delaney* v. *United States,* No. 4652, October Term 1952, October 10, 1952).

Pre-trial Publicity in General

14. "Of course, it would have been a gross impropriety on the part of the prosecuting officials if they had made available to the press all this damaging material respecting Delaney" (*Delaney* v. *United States, supra*). "Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such event do not meet any civilized conception of due process of law" (Jackson and Frankfurter, JJ. concurring in *Shepherd* v. *State of Florida* 341 U.S. 50,53).

The grounds of collateral attack set forth above—the Perl incident, and the repeated unjust accusations of "atom spy" and "Fuchs ring" are independent of each other and of the ground set forth in the following claim; and yet they must also be incorporated into, and taken as part of the following. For it is the contention of petitioner that by the intermittent employment by prosecuting officials of the newspapers, radio and television, for the dissemination of their belief in the guilt of petitioner and his co-defendants, and the advance depiction of evidence both admissible and

inadmissible against them, the Prosecution made a fair trial before an impartial jury an impossibility.

" 'Trial by newspapers', like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country". (Frankfurter, J. concurring in *Pennekamp* v. *Florida*, 382 U.S. 331). The courts may still wrestle with the problem created by publicity for which the prosecution has no responsibility, but when prosecution officials are direct participants in the bringing to bear of the "evil influence", there is a violation of due process of law.

15. This issue is but tendered by these papers; the full scope of what is complained of can only be portrayed by the use of this Court's process to compel disclosure of the nature and extent of the pre-trial "press-feeding" that took [fol. 243] place here on the part of the prosecution, both by way of formal press releases and by way of informal announcement.

16. As related above, the arrest of Dr. Klaus Fuchs was an event of a notorious and shocking character, both because of the nature of our relations with the Soviet Union, and the shock and horror attendant upon announcements relating to the atomic bomb and the hydrogen bomb. It seems to have been thought appropriate for the F.B.I. to announce "that the case involving Dr. Karl (sic) Fuchs was developed by British authorities on information furnished to them by the Federal Bureau of Investigation" (official F.B.I. release, e.g. Journal American February 3rd, 1950).

Immediately thereafter, it seemed appropriate to broadcast "F.B.I. launches hunt for U.S. bomb spies" (Journal American, February 5, 1950). The "hunt" was accompanied by a spate of publicity typified by a series of prominently published articles (Journal American, February 12, 13, 14, 15, 16, 1950) charging "Atomic Spies Shielded by U.S. Official Laxity", complaining "No American Arrested Yet" and inquiring "Who Protects Them"?

Whether because of this background, or for other reasons, not themselves of great significance, the series of arrests that preceded the present prosecution were accompanied not merely by the usual newspaper coverage of criminal arraignments; they were announced by press release after press re-

lease, and heralded by off-the-record and on-the-record predictions and claims, all calculated to produce a pre-trial atmosphere of hostility and prejudgment of guilt. There was even an open appeal to prejudice in reference to the Eastern European parentage of some of the defendants—a reference that would never have been admissible at the trial—and editorialization which was in fact incompatible with the indictment under which the defendants were actually tried, for example, the Director of the Federal Bureau of Investigation saw fit to state, in an official release:

> "The gravity of Rosenberg's offense is accentuated by the fact that through his implication in the espionage ring as a native born American citizen, he aggressively sought ways and means to secretly conspire with the [fol. 244] Soviet Government to the detriment of his own country". (Journal American July 18, 1950).

17. The purpose of this affidavit is not to present more than the highlights of petitioner's claim of pre-trial newspaper exploitation by the prosecuting agency. It has been physically impossible to gather and prepare the material separately, but the documentation is to be found, in sufficient volume to demonstrate the need for a- least a hearing on the issue, in the exhibits annexed to the petition of the defendants Rosenberg, signed by Emanuel H. Bloch, dated November 24th, 1952.

18. The conduct of the prosecution must be evaluated in the light of the quality and character of the public opinion formed by multiple press, radio and television references to the subjects of atomic warfare, espionage, atomic espionage and Communist activity in 1950-1951. Obviously the prosecution has no direct responsibility for the pre-existing general public sentiment (except, in a special way, where the same was formed, or contributed to by legislative committees and others purporting to act in the interest of public welfare; for the measure of such responsibility, of Delaney v. United States, supra). But the fact of the widespread opinions, prejudices and preconceptions, brought about before and during the pre-trial period, must be taken into account in measuring responsibility for what was then done in specific relation to this case. A massive record could be made as to those other matters.

A. No proof need be tendered on the issue that there existed in 1950-51 a "heated public feeling against Communist-"; that has been the subject of judicial notice (United States v. Dennis 183 F. (2d) 201, 226.)

b. Reference has been made to the state of "intense public alarm" existing with relation to the character and threat of atomic warfare—uranium or hydrogen. It existed prior to May of 1950, it continued, unabated, in the subsequent period. For example, "Atom Bomb Havoc Envisioned by Clay" (N. Y. Times, August 10, 1950); "Effects figured in atomic blasts" (N. Y. Times August 13, 1950); "Atomic [fol. 245] Burns Pose Big Problems Here (N.Y. Times August 16, 1950); "Order Red Vessels Halted in Bay to Undergo Search for Explosives" (Daily Mirror, July 28, 1950): "Don't play down reds atom skill, Briton warns" (Daily Mirror, Aug. 8, 1950); "U.S. Handbook describes A-bomb effects" (Daily Mirror August 13, 1950); "If Red A-B Come They'll Come A-Helling: A-Man" (Daily News, September 1, 1950); these are but a few representative headlines *during the single month that petitioner was arrested, and unjustly labeled as one who was an "atom spy"*.

c. The whole subject of espionage was also one that was constantly harped on—with the more or less sensational treatment that this subject always received in press coverage. "Federal Jury asks Tighter Net on Spies" (Journal American, June 15, 1950) "Red Spy Activities Put at New High" (Journal American, Feb. 8, 1950); "Senate Group Votes Death for Spies For Next Two Years" (Daily Mirror, August 1, 1950); Reds shift A-Spy Pattern" (Journal American, June 17, 1950) are but a few representative examples.

19. It may be appropriate to introduce the material that follows with an item appearing in the press of this period:

> "Public media in Britain are in no position at this point in the Fuchs case to match the scrutiny to which security incidents may be subjected in the United States. British law forbids the press to say anything which might prejudice the defendant's chances for a fair trial". New York Times, Feb. 19, 1950, Sec. E P. 7)

Instead of the unusual precaution and self-restraint that should have been exercised by the prosecuting agencies, not only because of the grave passion-rousing character of the charge, but because of the existing inflamed state of public opinion, the arrests in the present case were accompanied by a succession of foul blows calculated to make dispassionate consideration and a fair trial utterly impossible.

The pattern was established at the time of the arrest of Harry Gold and David Greenglass. Each of these events was accompanied by a fanfare of publicity, not merely prosecution-inspired but prosecution-announced.

[fol. 246] *Gold*: "J. Edgar Hoover, director of the Federal Bureau of Investigation and Attorney General J. Howard McGrath said in a joint statement at Washington that Dr. Fuchs had turned over secrets about the atomic bomb to Gold". N.Y. Times, May 24, 1950. The release seemed to have been a lengthy one summarizing Gold's alleged role as a Soviet agent, announcing reported admissions, detailing a series of contacts with Fuchs; claiming that the F.B.I. "had long been watching Gold", quoting Gold's purported statement of alleged motivations (i.e. "helping a nation whose final aims I approved"). It was considered proper and germane to include in the announcement: "He was described as having been born in Switzerland *of parents who were both natives of Russia . . . Their family name of Golodnitzky was changed to Gold when the parents were naturalized, the department said*".

Greenglass: Instead of a joint announcement, parallel announcements were made by U.S. Attorney Saypol, and New York Special Agent in Charge, Edward Scheidt. (Daily News, June 17, 1950). One of these made a point of making clear that *Greenglass' Father* was *Russian born* and *his* mother *English born* (N.Y. Times, June 17, 1950). Mr. Saypol said that Greenglass "actually was engaged in constructing the atom bomb" at Los Alamos, a stretching of the truth for sensational purposes when compared to Greenglass' actual testimony at the trial, Mr. Scheidt felt impelled to claim that Greenglass had disclosed his motive as being to help an "ally" deprived of information by "gross negligence". Mr. Saypol apparently called in the reporters twice: "Saypol later gave reporters a slightly amended

version of Greenglass' statement about fleeing". (Daily News, June 17, 1950).

On the previous day, a lengthy statement had been released, with details of alleged evidence etc., by J. Edgar Hoover, pertaining to the arrest of Alfred Dean Slack at Syracuse. (Daily News, June 16th, 1950; New York Times June 16, 1950).

[fol. 247] 20. The pattern thus established was exploited to the limit, in connection with the arrests of the defendants who were tried on their pleas of "not guilty" in this case. The characterization that were employed had a repeat value, for they were referred back to and quoted on subsequent occasions with reference to the pre-trial proceedings, or in connection with the impending trial.

The treatment of the arrest of Julius Rosenberg was calculated to strip him of the presumption of innocence and preclude the possibility of a fair trial by an impartial jury. Such treatment obviously rebounded to the prejudice of all defendants. The press clippings speak for themselves as to whether any jury could have been secured, which would have been free of preconceptions, even if "in answer to inquiry by the trial judge" they had affirmed "that they were prepared to determine (his) guilt or innocence solely on the basis of evidence produced at the trial". (*Delaney vs. U. S., supra*).

In evaluating the effect of the following, full significance must be accorded to the trust which most Americans place in the F. B. I. It is that trust that was being exploited by the use of its name as a badge of authenticity on pre-trial announcements.

> "Fourth American Held as Atom Spy".
>
> "New Yorker (Julius Rosenberg) Seized Here Got Los Alamos Bomb Data for Soviet Ring, F. B. I. Reports."

The foregoing was the headline treatment in the New York Times, July 18th, 1950. The source is made clear. "The announcement of the arrest was made jointly by J. Howard McGrath, the Attorney General and J. Ed Hoover, director of the Federal Bureau of Investigation". The release not only was lengthy, but full of detail, and embody-

ing characterizations calculated to prejudice Rosenberg irretrievably. "Mr. Hoover described Mr. Rosenberg as 'another important link in the espionage apparatus' that included Dr. Klaus Fuchs," etc. "Mr. Hoover related that Rosenberg recruited Greenglass . . . "Mr. Hoover said that Rosenberg gave Greenglass specific information as to the type of atomic data the Russians desired". A sub- [fol. 248] stantial part of the prosecution's case at the trial was outlined. There followed the editorialization, attributed to Mr. Hoover and not denied by him, that the "gravity of the Rosenberg offense was accentuated by the fact that he, an American born citizen aggressively sought means to secretly conspire with the Soviet Government to the detriment of his own country".

The pernicious effect of this particular statement, improper in itself, in advance of trial, is heightened by the fact that even the indictment did not charge that the defendants sought to bring about "injury to the United States" but only "advantage to a foreign nation". And it was only the latter of these alternative forms of statutory intent (Former U. S. C. Sec. 32) which the prosecution purported to have proved at the trial.

The characterization as "aggressive" had a repeat value which permitted it to be driven in on other occasions. The Evening Journal American on July 18, 1950, picked up and employed it thus: "Branded as one of the most 'aggressive' agents in the Klaus Fuchs atomic spy ring which turned over vital secrets to Red Russia, a City College engineering graduate today was held on charges of war time espionage. He is Julius Rosenberg . . ." It was picked up to serve triple duty a month later when it was reported, Journal American, August 17, 1950, that Mr. and Mrs. Rosenberg "were indicted today as 'aggressive' members of the Klaus Fuchs atomic spy ring". Needless to *d*ay, the word "aggressive" does not appear in the indictment.

Likewise, the characterization of Rosenberg as "another important link in the Soviet espionage apparatus", was picked up to be applied to him on other occasions, as when the New York Times reported the first indictment against him, August 18, 1950, p. 7, col. 1; likewise, the New York Post, August 17, 1952, p. 15, Col. 3.

The full text of the Hoover-McGrath press releases would have to be subpoena'd at the hearing which it is sought to have to be subpoenaed at the hearing which it is sought to ments were reported and displayed in all of the newspapers; some in one group or another. It apparently included, for [fol. 249] example, the information obviously significant in bringing about a prejudgment by the community, that "Rosenberg was fired by the War Secretary in 1945 on information that he was a card-carrying Communi*ts*" (New York Post, July 18, 1950, p. 14, col. 5; see also Daily News, July 18, 1950, p. 3). It was asserted in the Daily Mirror, July 18, 1950, "Hoover said his inquiry indicates that Rosenberg on his own initiative 'made himself available to Soviet agents so he could do the work he felt he was slated for' and thus 'do something directly to help Russia". On the next day, the same paper added, attributing the statement to the F. B. I., that Rosenberg "had pleaded with Greenglass to flee the United States" (p. 5, col. 5, July 19, 1950).

If the New York *p*ost and Daily News are to be believed, the F. B. I. even went so far as to state:

> "The F. B. I. quoted Rosenberg as saying 'I wanted to do something to directly help Russia' " (N. Y. Post July 18, 1950, p. 24, col. 1; see also Daily News July 18, 1950, p. 3 and 24).

Of course, no confession or purported confession to the F. B. I. was ever offered in the evidence at the trial; nor has any denial or repudiation of the above statement ever been published. (See Shepherd v. State of Florida 341, U. S. 50, 53).

21. The arrest of Ethel Rosenberg was announced with the same type of treatment, albeit not as extensive. "Arrest of the hysterical Mrs. Ethel Rosenberg of 10 Monroe Street in the Knickerbocker Villa*t*e development, was announced simultaneously by U. S. Attorney Saypol here and by F. B. I. Director Hoover in Washington" Daily Mirror, August 12, 1950, page 2. "Saypol said she and her husband and others recruited her brother to get secret atom data". (id), and, without the burdensome difficulty of awaiting a court ruling as to the admissibility of the evidence, or any

accompanying caution, "We have ample evidence of the fact Mrs. Rosenberg and her husband have been affiliated with Communist activities for a long period of time" said Saypol (id; the same statement is quoted in the New York Times of August 12, 1950, p. 1 only there it is attributed to "Myles J. Lane, Chief Assistant United States Attorney". *Accord:* Journal American, August 13, 1950, p. 4.
[fol. 250] There was also the inevitable: "The F. B. I. report on Mrs. Rosenberg's background showed that she was born in New York City, September 28th, 1915, *of a Russian father and an Austrian mother*".

22. The pattern was repeated at the time of the arrest of this petitioner. The formal announcement was made, it seems, by "F. B. I. Director J. Edgar Hoover (e.g. Daily News, August 19, 1950 p. 2: Journal American August 18, 1950, p. 1) but United States Attorney Saypol was not far behind, in making a series of claims and announcements (e.g. New York Times Aug. 18, 1940 p. 1, Daily News, August 19, 1950, P. 2). There was no delay in stating: (His parents, both born in Russia, are naturalized Americans". (Daily News, August 19, 1950.)

"U. S. Attorney Saypol said that the arrest of Sobell was made under his direction. "We have been investigating Sobell for some time', he added," (Daily News, August 19, 1950. By the next day, this had grown to "U. S. Attorney Saypol said he had been investigating 'for a long time' ". (N. Y. Post August 20th, 1950, p. 23).

The reference to Sobell as an "atom spy" collaborator of Fuchs, all wholly unjust, even on the interpretation of the testimony on the trial most favorable to the government, are sufficiently set forth above. In an additional area, at the time of the arrest, there was mortal harm done to Sobell's possibility of receiving a fair trial. At the time the prosecution decided to question him, they learned he was on a trip to Mexico, and by their agency, he was caused to be brought back, as more fully set forth in the record of the trial. A question was presented for the jury as to whether or not his presence in Mexico constituted "flight" and hence, some evidence of consciousness of guilt. The prosecution brief in the Circuit Court of Appeals, (2.28), concedes that this was a jury question, The prosecution even

insisted that evidence of alleged "deportation" from Mexico was admissible, claiming:

> "Had it not been for that evidence the jury might have inferred that Sobell returned to the United States. vol-[fol. 251] untarily (perhaps from a vacation in Mexico, and that he had always intended to do so" (Br. C.C.A., p. 65-66).

But the fact is that no juror who had read about the case in the newspapers—and the record shows that most of them had (R. 63) could have had an open mind in view of the publicity which was calculated to have the question whether or not his absence was "flight", prejudged and decided against Sobell, even before he had a chance to plead to the indictment. "F.B.I. Director Hoover said Sobell, who is accused of having spied for Russia . . . fled from New York to Mexico City by plane after the arrest of David Greenglass, June 16", (Journal American, August 18, 1950 p. 1). "The family fled to Mexico City" (Journal American, August 24, 1950 p. 4); "Fleeing Radar Expert Nabbed as Atom Spy" (Daily News, three columns headline, August 19, p. 2); "Morton Sobell, 35 year old radar expert . . . caught on the lam in Texas . . . was indicted with four other asserted members of the Klaus Fuchs-Harry Gold atomic spy ring yesterday" (Daily News, October 11, of 50 p. 4) "In Washington, F.B.I. Director Hoover said Sobell fled the U. S. in June to avoid arrest the day after the arrest of David Greenglass . . .The F.B.I. said that Sobell was so alarmed by the arrest of Greenglass that he took a plane for Mexico City" (N.Y. Post, August 18, 1950, p. 2.)

Most extensive was the treatment of the subject by the New York Times, which added material never offered in evidence at the trial, and hence never subject to the rules of evidence or the test of cross-examination. It is not possible that the following was the work of an industrous reporter; the report is so soon after the event that it must have been "fed" by the prosecution:

Subheadline: "Believed to Have Gone to Get Passage to Soviet".

Subheadline: "Fled Queens on June 21".

Text: "It is believed that they were awaiting Russian visas for a Scandinavian Country from which they would proceed to the Soviet Union or one of its satellities".

Text: "In addition, the engineer never got in touch with his employer, The Reeves Instrument Corporation".

Text: "The Sobell flight to Mexico".

[fol. 252] Text: "Rosenberg is alleged to have told Sobell to leave the country" (All from New York Times, August 19, 1950, p. 1).

The Daily Mirror, under a three column headline characterizing petitioner as a "Fugitive Spy" likewise contained a statement never made the subject of proof: "Sobell, accompanied by his wife and children, fled to Mexico within five days after Greenglass' arrest, U. S. Attorney Saypol said. He was traced to Mexico City, where he apparently was trying to arrange transportation for himself and his family to Russia or a Red satellite state. (Aug. 19-50 p. 2).

23. As stated above, the foregoing is but a representative selection of the material that will be set forth in original photostat form in the affidavit of Emanuel H. Bloch on a companion application on behalf of his clients, Julius and Ethel Rosenberg. Physical and financial limitations have made it impossible to reproduce the photostats as an exhibit to this affidavit, and it is respectfully requested that the exhibits to the Bloch affidavit be so treated on this application. The full impact of the type of publicity employed, the continuance and reiteration during the pre-trial period, can only be derived from examination of the actual exhibits.

The Use of Evidence of Treachery in the Guise of Evidence of "Specific Intent"

24. By reason of the unexpected interpretation by the Court of Appeals of the Espionage Act as permitting evidence of "devotion to another country's welfare" to be used as proof to establish specific intent to furnish secret military information, petitioner was deprived of the opportunity to raise, at the trial, the claim that this conviction was in violation of the Treason Clause of the Constitution.

This contention raises a point of law which will be briefed and argued on the return date of this motion.

[fol. 253] Knowing Use of Perjured Testimony

25. By reason of proof to be tendered in the Rosenberg petition under Section 2255, it will be jointly claimed in behalf of all petitioners that the conviction herein was secured by employment of perjured testimony, knowingly, by the the prosecution. While this witness did not name this petitioner, the case was tried on a theory of a single conspiracy, and hence, if the point be established, it should inure to the benefit of all defendants.

Concerning Further Stay of Transfer

26. Petitioners' attorney has prepared this affidavit and petition under great time handicap and pressures as reflected in his earlier affidavit of November 19, 1952, in support of an application for temporary stay of the transfer of petitioner from detention at New York, to the federal pententiary at Alcatraz. I, therefore, beg leave to reserve the right to amend and supplement this petition and affidavit (a) by reference to any other or additional claim on ground that may be made on behalf of the Rosenbergs and which will be of a character that should inure to the benefit of Sobell; (b) by such additional claim or ground as may be fit or proper, pending final decision of this application.

27. By order to show cause, signed November 19, 1952, on the showing made on my affidavit of November 19, 1952, the Attorney General was stayed from transferring Sobell from the Federal Detention Headquarters on West Street, pending hearing on a motion to restrain such transfer. At a hearing at 5:30 p. m. November 19, 1952, the United States Attorney moved to vacate the stay before the Judge who signed the order (Weinfeld, D. J.) and the motion to vacate was denied. On the return date of the motion brought on for hearing by the order to show cause, the Court (Weinfeld, D. J.) directed that the stay be continued until midnight, Tuesday, November 25, 1952. This relief was granted without prejudice, as I construe the Court's remarks, to a renewal of the application for a stay, at the time that this petition shall be presented.

[fol. 254] 28. On behalf of the petitioner, and with his express authorization, I do now hereby request that a further stay of his transfer be granted as provided for in the order to show cause presented with these papers. In paragraph 27 above, I have described the only previous application for this relief, and the extent to which it was granted. By its favorable disposition of the earlier application, the court has ruled, after having heard the United States Attorney twice, that it had power to grant such relief. The question once more presented is as to whether the Court should exercise its power. As bearing on this question, in addition to the facts stated in my affidavits of November 18 and 21st, I desire to add; the petitioner is a scientist, and holder of a Master's degree. He is clear-thinking, articulate and at all stages, since I was retained to assist in his appeal to the Court of Appeals, has been concerned with the content of the legal arguments to be made on his behalf, and the briefs, to be submitted. Not only has his desire to participate been keen, but his ability to do so has been noteworthy, in connection with preparation of briefs, and the consultations concerning the preparation of this petition. The question presented at this state, and on this application, is whether he may continue, pending such orders as this Court may make on the merits of this petition, to have the benefit of the advise of counsel charged with responsibility of prosecuting his petition, and the right to continue to contribute, in consultation, in the manner in which he heretofore has. In this connection, it is not without significance that he risked loss of many months' time by requesting that the Supreme Court stay the mandate of the Circuit Court, after affirmance; it is also significant that the Supreme Court granted the motion for s-ay of mandate (R. 1715) upon the filing of a motion in which it was stated on petitioner's behalf; "Unless a stay of mandate as sought herein be granted, petitioner will be irreparably injured in that he will be transferred to a Federal Penitentiary outside of New York and unable to consult with counsel during a vital period".

[fol. 255] There can be no injury to the Government if the further stay sought herein be granted. Such a statement was made in my affidavit of November 19th, in support

of a request for a temporary stay no denial was made of the facts stated therein, nor even any affidavit tendered in opposition. The facts stated orally by the United States Attorney, in his application to vacate the stay, were found, in independent inquiry by the Court, to be inaccurate. It might seem reasonable, in view of this, to inquire, to the extent that the Court's discretion is involved here, into the motivation for the Government's opposition. In this connection, I think it proper to state that after petitioner's conviction, the penological judgment of the Bureau of Prisons impelled its Director to direct Sobell's transfer to Atlanta penitentiary. It was stated to me by Mr. Bennett on October 28, 1952, that it was not planned, as of that date, to change that destination. While there is not presented by this application any question as to the reviewability of Mr. Bennett's more recent decision, the Court, in exercising its discretion, should take into account the fact that petitioner is a young, personable individual, a first offender, with parents and a wife and two children residing in the New York area. In the light of these facts, and the judicially known character of Alcatraz as a place of confinement of unusually dangerous criminals, the decision to transfer him there seems wholly arbitrary, and to be the result of a judgment in no way affected by the proper administrative concern of the Bureau of Prisons.

30. Apart from these considerations, which bear on whether or not the presence of the prisoner is necessary, whether or not he is to testify, is the fact that it cannot now be stated with certainty whether it will be necessary for him to testify. In the event a factual hearing were required on the claims set forth in this and the Rosenberg petition, it would seem most proper, if not required, that he be [fol. 256] present; the scope of his right, as declared by the Court of Appeals for this Circuit is that he be present and "free to testify" (*U. S.* v. *Paglia*, 190 F (2d) 445, 446—a formulation making it unnecessary to make a definite determination that he will do so.

Sworn to before me this — day of November, 1952.

—— ——.

[fol. 257] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF HOWARD N. MEYER IN SUPPORT OF MOTION (SOBELL)—November 20, 1952

STATE OF NEW YORK,
County of New York, ss.:

Howard N. Meyer, being duly sworn, deposes and says:

I made this affidavit, to supplement my affidavit of November 19th, 1952, in support of a motion for a stay of defendant's transfer.

I request that petitioner remain in New York until at least Tuesday, November 25th, 1952, so that he can sign the petition under Section 2255, which I expect to present to the Court no later than that date.

When the petition is presented, I shall renew my request that he remain here for further consultation, pending the filing of the U. S. Attorney's traverse, if any, and the hearing and determination of the petition.

In this connection, I respectfully refer the court to the only pertinent authoritative appellate discussion I have found of the fourth paragraph of Section 2255.

> "We do not think it was intended by such provision to give the court an absolute discretion . . . where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally in the exercise of a sound discretion, the Court should require the production of the prisoner".
>
> *Barrett* v. *Hunter* 180 (2d) 510, 514, (C. A. 10) C. C. 340 U. S. 897.

The Court thus recognized the fairness and appropriateness of the petitioner's presence, once the claim was ruled to be material and substantial enough to require a hear-

[fol. 258] ing, even if his testimony was not though- to be required.

Sworn to before me this 20th day of November, 1952.
(S.) Howard N. Meyer.

Bernard Davis, Notary Public, State of New York, Qual. Queens Co. Clerk Register Filed New York Co. Clerk and Register Commission expires March 30, 1953.

[fol. 259] In United States District Court

[Title omitted]

Amendment to Petition (Sobell)—November 25, 1952

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The undersigned, petitioner in a proceeding commenced under 28 U. S. C. 2255, dated November 24th, 1952, hereby amends said petition by adding, as sub-paragraph "f" of paragraph 5, the following:

"f. The alleged information pertaining to the national defense, which constituted the principal subject matter of the trial herein, had been arbitrarily and unlawfully classified as secret by the military authorities, and testimony purporting to show otherwise, adduced at the trial by the prosecution, must have been false, and known to the prosecution to be false for the reasons shown in the petition of the defendants Rosenberg dated November 24th, 1952".

Dated November 25, 1952.
(S.) Morton Sobell, Petitioner.

Howard N. Meyer, Harold M. Phillips, Edward Kuntz, Attorneys for Petitioner, 203 West 34th Street, New York 1, New York.

[fol. 260] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION, WEINFELD, J., DENYING FURTHER STAY OF TRANSFER —(SOBELL)—November 25, 1952

I heretofore granted a stay of removal of the defendant from the Detention Headquarters here at New York City to enable him to confer with, and assist, his counsel in the preparation of his application for relief under Section 2255 of Title 28, United States Code. United States v. Hayman; 342 U. S. 205, 221.

The petition for such relief has been completed and is presented herewith with a request for a further stay pending the determination of the motion. It also incorporates by reference the petitions for relief under Section 2255 submitted by the co-defendants. Since the papers have been fully completed, there is presently no need for an extension of the stay pending the return of the motion.

Whether the petitioner presents such factual issues as to require a hearing and his presence thereat are matters to be determined by the court before whom the motion is to be heard. Should it be determined that substantial issues of fact are raised the presence of the defendant will be required. *See United States* v. *Hayman*, 342 U. S. 205; *United States* v. *Rasario Pisciotta*, decided 2nd Circuit Court of Appeals November 3rd, 1952, Docket No. 22450

It is respectfully suggested that the Attorney General's representatives consider this likelihood before effecting a removal of the defendant, to avoid incurring unnecessary expenses in returning him to this jurisdiction.

[fol. 261] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDWARD KUNTZ IN SUPPORT OF MOTION—(SOBELL) December 5, 1952

STATE OF NEW YORK,
County of New York, ss.:

Edward Kuntz, being duly sworn, deposes and says:

I am one of the attorneys for defendant-petitioner, Morton Sobell, and make this affidavit in support of his petition to vacate his conviction under 28 U. S. C. 2255.

1. I was trial counsel for Sobell, together with Harold M. Phillips, Esq., but I was not retained until late in August, 1950, nor was Mr. Phillips. We were not then aware of the nature and full scope of the prior publicity pertaining to the individuals who were ultimately named as defendants in the superseding indictment of January 3st, 1951; in particular, we had no knowledge of the nature and extent of the direct participation of the prosecution in bringing about the hostile community attitude toward the defendants. The burden we undertood, in the pre-trial, period, was such as to preclude possibility of independent investigation into the subject. The time and expense required for the extensive study of the newspaper, radio and television reportage that occurred before we were retained would have made it a practical impossibility, even if we had contemplated its desirability.

2. At the time I became aware, during the trial, of the indictment of William Perl, I raised with fellow trial [fol. 262] counsel, the question as to its significance. I was not aware of the statement of Mr. Saypol quoted at page 4 of the affidavit of Howard N. Meyer of November 24, 1952. As I recall it, on the morning of March 15, 1951, Mr. Bloch and I approached the bench to discuss it with Judge Kaufman. This was off the record, at the court's direction. When we had expressed our apprehension, Judge Kaufman turned to Mr. Saypol who assured him that the Perl indictment was "perfectly routine" and had

nothing to do with the pending trial. Judge Kaufman turned to us and said in words or substance, "You've got to take his word for it". In the circumstances, and relying upon this representation of Mr. Saypol, and in view of the Court's direction that the colloquy be off the record, I did not raise the question on the record. Of course, had I known that Perl would not be brought to trial for eighteen months thereafter and the other circumstances set forth in the moving affidavit of November 24, 1952, it would have been evident that it was not "routine" and that the timing of the indictment raised questions which it would have been my duty to raise for the record.

Sworn to before me this 5th day of December, 1952.
(S.) Edward Kuntz.

[fol. 263] In United States District Court

[Title omitted]

Affidavit of Howard N. Meyer in Support of Motion (Sobell)—December 5, 1952

State of New York,
County of New York, ss.:

Howard N. Meyer, being duly sworn, deposes and says:

I have read the affidavit of Emanuel H. Bloch, Esq. duly verified December 5, 1952, and the supplementary affidavits to be submitted in connection therewith. Said affidavits refer to factual matters on which the petitioner Sobell takes a joint position with the petitioners Rosenbergs and hence, I respectfully request that the contents of such affidavits be deemed incorporated herein and made part of the record in the separate petition of Morton Sobell.

Sworn to before me this 5th day of December, 1952.
(S.) Howard N. Meyer.

[fol. 264] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MYLES J. LANE IN OPPOSITION TO MOTION —(SOBELL)—December 12, 1952

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

Myles J. Lane, being duly sworn, deposes and says:

I am the United States Attorney for the Southern District of New York and am familiar with the facts and circumstances of this prosecution.

This affidavit is submitted in opposition to a point raised only in the Sobell petition under Section 2255 with regard to the "use of evidence of treachery in the guise of evidence of 'specific intent' ".

As stated in the Sobell petition, this point is raised as a result of the "interpretation by the Court of Appeals of the Espionage Act". Obviously, this Court is not the proper forum to correct any alleged errors committed by the Court of Appeals.

This precise point was presented to the Court of Appeals in Point II of Sobell's petition for re-hearing in the Court of Appeals, and that Court saw fit to deny the petition. Similarly, in Sobell's petition in the Supreme Court for a writ of certiorari he raised the same question, and in his petition for re-hearing in the Supreme Court, he raised this question in the following terms:

> "The Espionage Act was incorrectly construed by the courts below, to permit proof of "treachery and general intent to betray" to be offered as evidence of [fol. 265] the essential specific intent to advantage a foreign nation, and as so construed and applied in this case, the Act is in conflict with the Treason Clause of the Constitution."

This point having been available to the defendant in all appellate courts, and he having urged the point in such

court, the cases are clear that it is not properly a basis for a motion under Section 2255. This section is not designed to cure any trial errors which were available to and urged in the appellate courts. Had there been anything to the argument now raised, the appellate courts would have afforded the relief which Sobell there sought. Having denied it, section 2255 is not available to raise the point.

All the other contentions raised in the Sobell petition are identical with those raised in the Rosenberg petition. These are answered in the affidavit submitted on the Rosenberg motion and exhibits thereto attached, a copy of which is hereby incorporated herein.

Wherefore, it is respectfully submitted that the motion should be and in all respects denied.

Sworn to before me this 12th day of December, 1952.
(S.) Myles J. Lane.

Daniel Tanenbaum, Notary Public, State of New York, No. 24-3930200, Qualified in Kings County, Cert. filed with Kings & N. Y. Co. Clks., Term expires March 30, 1953.

[fol. 266] In United States District Court

C. 134-245

United States of America

vs.

Julius Rosenberg and Ethel Rosenberg and Morton Sobell

Stenographic Minutes

Before:

Hon. Edward Weinfeld, District Judge.
New York, November 26, 1952.
11:45 o'clock a.m.

Appearances:

Myles J. Lane, Esq., United States Attorney for the Government; By Roy M. Cohn, Esq., Special Assistant to the Attorney General, and

James B. Kilsheimer, III, Esq., Assistant United States Attorney.

Emanuel H. Bloch, Esq., Attorney for Defendants Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Esq., Attorney for Defendant Sobell.

[fol. 267] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Bloch and Mr. Meyer, application is made to refer this. As I understand it, a motion under 2255, Title 28, to the trial and sentencing judge, and why should not the motion be referred?

As I read the section, I believe it should be referred. Now tell me why it should not be referred?

Mr. Bloch: I think the only part in which this motion should be properly heard is this part.

I would like to urge the Court and read to the Court the language of the rules of criminal procedure of the Southern District.

Rule 3(c) provides:

> "Motions for correction or reduction of sentence under Rules of Criminal Procedure 35 or to suspend the execution of sentence under 18 U. S. C., Section 365 or an arrest of judgment under Rule of Criminal Procedure 34, shall be referred to the trial judge."

I submit at the outset that this application that the petitioners have made here is a completely independent proceeding, divorced from the proceedings had on the main trial.

This is not a motion for a correction or reduction of sentence under Rule 35. This is a motion or an application, if you will, to set aside an illegalized sentence. Nor [fol. 268] is this an application to suspend execution of sentence under 18 U. S. C. Section 3651, nor is it an application for arrest of judgment under Rule 34.

As a matter of fact, that motion was made immediately upon the rendition of sentence back in April, 1951.

Now, in order to dispel any doubt that anybody might have entertained about where this application should be heard, the judges of this court promulgated Rule 5, which

is captioned "Writs for Habeas Corpus," and it reads as follows:

> "Writs of habeas corpus in criminal, removal and extradition proceedings shall be heard in the criminal calendar part."

Now, Section 2255, is in essence a writ of habeas corpus. I think that the legislative history and purposes or the enactment of that statute has been fully set forth in the Haiman case. As I read it, it indicates that 2255 was passed because of administrative difficulties that had been encountered for many years by the district courts of the United States.

In the traditional writ of habeas corpus there is the prerequisite or the production of the body, and prisoners who are confined in federal penal institutions instituted writs of habeas corpus, and because the body was required to be produced, they were necessarily brought in the district in which the penal institution of the lodged prisoner was situated.

[fol. 269] As a consequence, a couple of district courts in our entire system were flooded with these applications.

There was a second difficulty. When the applications were made in those districts which contained the body of the prisoner, any inquiry into the facts necessarily entailed an examination of facts that were best known to persons residing in the original district where the prisoner was sentenced, and the files of the sentencing court were located away from the place where the application for the writ was made.

So that the Judicial Council studied this problem of the enactment of a provision which would bear within it all of the protection that the great writ of habeas corpus but without overburdening the courts with these administrative details and difficulties and encumbrances and impairment and breakdown in the administration of criminal justice, especially in those districts where there was a concentration of litigation under the habeas corpus proceedings.

So, 2255 was enacted, and all of this, your Honor, is

merely a parroting on my part of what the Supreme Court of the United States has stated in Haiman case.

Therefore, Section 2255 is in fact a writ of habeas corpus. The relief which is requested in a writ of habeas corpus. [fol. 270] And I submit that Rule 5, enacted by the judges of this court, had in mind and could only have in mind that this type of a writ, which is a writ of habeas corpus, should be heard "in the criminal calendar part" which is this part.

Now, if there is any doubt in the Court's mind as to the propriety of hearing this application in this court, I submit that the provisions of the rules should dispose of that. There are additional reasons.

I want to be as open and as frank with this Court as I possibly can be. The petitioners, in the event that any matter pertaining to this cause may be brought before the sentencing judge, will submit an affidavit of bias and prejudice.

The Court: Under the rules, who passes upon that?

Mr. Block: That may be—I am now addressing myself to the determination that you will make in the prosecution's suggestion or request that this matter be referred.

The Court: That is anticipating something. I am only raising the question, and it was raised the other night when the application for the stay was made as to whether or not a petition under 2255 does not belong to the sentencing court. The only question that there is here now is——

Mr. Bloch: It seems to me then that that question must [fol. 271] be broken into two parts. One, the power of this court to refer it, and, secondly, if that question is disposed of adversely to my contention, the question of the exercise of discretion on the part of your Honor in referring it.

I have attempted to show your Honor that the legislative history and purpose of 2255 in conjunction with the enactment of Rule 3(e) and Rule 5 in this court is most persuasive that you, sitting as a judge of this criminal part, have the power, and the exclusive power to hear this application.

Now, if you have any doubt about the validity of this argument, then I come to the second aspect of this ques-

tion, and that is whether or not you should exercise your discretion in referring it. And when I talk about bias of the sentencing court that will be raised, I was addressing myself to the second part.

The Court: You say it will be raised?

Mr. Bloch: Pardon me?

The Court: You say it will be raised, and obviously any application on that basis is premature and, as you know, must be addressed in a certain manner, as provided by law.

Mr. Bloch: That is true, your Honor, but I have to tell you, in making up your mind as to whether or not to refer [fol. 272] this that you are putting us into the hands of somebody that these petitioners claim will be totally biased, and I think this is a very material consideration in moving you in your deliberation as to whether or not this should or should not be referred.

Now, if you want me to expatiate on that, I will.

The Court: No, you do not need to, because the single issue at this point is whether or not under 2255 I am required to refer it to the sentencing judge in the trial court. That is the sole question. That is a legal matter.

Mr. Bloch: If your Honor please, I conclude by stating that you are not only not required to do it, but I think it is your responsibility to keep this before you.

The Court: Do you want to add anything, Mr. Meyer?

Mr. Meyer: I would like to be heard, if your Honor please. I am not going into things covered by Mr. Bloch. I think that the sentencing court, as that phrase is used in Section 2255 of the United States District Court for the Southern District of New York, and that is where we are now, as to whether your Honor is required to refer it, which seems to be the question here, I have, since the other evening, only been able to ascertain that, found two other cases under 2255, applications in this court.

One I would like to refer to only on the basis of informa- [fol. 273] tion which I have, which is not based on the trial court matter, and which will have to be subject to verification. But I am informed that an inmate of the Federal House of Detention named John D. Walker had a 2255 proceeding, although he had been brought to sentence by

Judge Sugarman, a 2255 was referred to and considered and decided by your Honor.

In another case which I located simply through the appellate record in CCA, the Paglia case— I find there that the sentencing judge was Judge Davidson but the motion was referred and considered by Judge T. Hoyt Davis.

I would also like to refer to a case which I believe conforms with the spirit and intent of 2255, the Bruno case, in 180 Fed (2d) 393, where it was held that the 2255 proceeding is an entirely new, independent and separate proceeding from the criminal, and the nature of what was decided there had to do with a procedural question as to whether or not 2255 had been held prior to the appeal in the main case, whether the notice of appeal on the record in the main case also brought up the appeal on 2255.

The Court of Appeals for the District of Columbia held there that the 2255 proceeding was so independent and separate that it could not be brought up by the same notice of appeal.

I should also like to refer to the proceeding in another [fol. 274] case, where application was made to Judge Knox's secretary in connection with my presentation of an order to show cause last week. The question was raised by me that in view of the fact that Judge Kaufman was in the ex parte part of the court as to whether or not it was not appropriate for some other judge to pass on it, even though it was an order to show cause, and by Judge Knox's direction, I was referred to your Honor.

Now, I have asked Mr. Cohn, and there is one more point that I cannot speak on—I asked Mr. Cohn this morning as to whether he had any answering affidavit or traverse to hand up to petitioner's affidavit. He said that they were not here, but they were being typed upstairs.

It seems to me that on the issues as made, if the issues are made by that answer or traverse, that there may or may not be questions of fact presented. I do not know just what the contents of that will be. I do say that it is not inconceivable, and I cannot represent it any stronger than that, because I am speaking only on the basis of papers which are before your Honor, it is not inconceivable that in this proceeding Judge Kaufman may have to be a wit-

ness. That is as well as I can put it now. I would not want to make any other representation than that. The facts and the events which are referred to are referred to in the papers.

[fol. 275] Of course, going back to the history of 2255, the Haiman case, that case will indicate that one of the reasons for 2255 was in order to make it possible for the trial of this collateral attack to be at a place where the Assistant United States Attorney, Clerks and Judges who might have to testify in this type of proceeding would be readily available, it was easier to transport the prisoner than the court officials.

The Court: Have you looked up any authorities on this?

Mr. Meyer: Merely what I told your Honor, and also the record as to the rules.

Mr. Bloch: I suggest in connection with that that the Haiman case is ruling, and I assume your Honor has read it and is familiar with it.

The Court: I think I referred to it the other night in the discussion.

Mr. Bloch: That is correct.

The Court: And it shall refer to it presently.

Mr. Bloch: I think that anybody can say that 2255 is a writ of habeas corpus proceeding.

[fol. 276] C. 134-245

UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG, ETHEL ROSENBERG and MORTON SOBELL

OPINION

(Weinfeld, Jr.)

The Court: I am satisfied that Section 2255 of Title 28 of the United States Code contemplates that a motion made thereunder shall, absent special considerations, be heard by the judge who conducted the trial and imposed the sentence.

Thus, the opening paragraph of the section states that: "A prisoner in custody may move the court which imposed the sentence to vacate, set aside and correct the sentence."

Other references of the court are of similar import.

Another paragraph of the section reads: "The sentencing court shall not be required to entertain a second or successive motions for similar relief on behalf of the same prisoner."

And in the final paragraph, we find that an application for a writ of habeas corpus shall be denied if: "the applicant has failed to apply for relief by motion to the court which sentenced him."

While it may be argued with some degree of plausibility that the reference to the sentencing court refers to the [fol. 277] court of the district wherein the trial was conducted and sentence imposed, the legislative history of Section 2255 and the purposes intended thereby appear to negative this contention.

Finally, even if it be held that the expression "sentencing court" is all-inclusive and refers to the district court which sentenced the defendant, in view of the purposes intended by the section discussed at some length by the Supreme Court in the case of United States v. Haiman, 342 U.S. 205, the matter should be referred to the trial judge.

Chief Judge Parker of the Fourth Circuit Court of Appeals, who was the chairman of the committee on Habeas Corpus Procedure of the Judicial Conference, which initiated and sponsored the section, passed directly on this point, in Carvel v. United States, 173 Fed. (2d) 348, and this is what he said:

> "Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks [fol. 278] upon the regularity of trials made before another judge through resort to habeas corpus of Section 2255 of Title 8 was inserted in the Judicial Code."

That is Carvel v. United States, 173 Fed. (2d) 348.

Now, under the circumstances and in view of the statement by Chief Judge Parker, who played a very prominent part in the promulgation of the section, and stated the views as expressed at this point, in the absence of special circumstances the motion is referred to the trial judge.

Mr. Bloch: If the Court please, the last sentence in your opinion is quite interesting, in the absence of special circumstances. I was about to address myself to the court about those special circumstances which exist here.

The Court: Mr. Bloch, I spent, as you probably suspect, the better part of an evening when you and counsel representing Mr. Sobell were in the other night going over these papers. I was governed by these papers and considered the matter in the light of the allegations in these papers, and there is nothing set forth therein which amounts to special circumstances requiring the transfer to any other judge for consideration by him.

Mr. Bloch: Your Honor, may I merely say this: It would have been physically impossible for your Honor to have read the record in this case which is marked Exhibit A.

The Court: I said I read the affidavits and your exhibits, and all the attachments other than the record which was not attached.

Mr. Bloch: Except this, your Honor: my exhibits are [fol. 279] part of the petition, and if you will read the record, those portions which I would like to point out to you, I think you would be convinced that there are special circumstances here which negative and strongly suggest that there be a referral to the sentencing court.

The Court: I have given it careful consideration and the matter is so referred.

Mr. Meyer: If your Honor please, I have another matter that has nothing to do with this question, but since the calendar is still before your Honor, if you will remember, in chambers, on Monday evening, I pointed out that my client and I had not at that time had opportunity to study a very substantial portion of the Rosenberg petition, the last part, as a matter of fact.

I had a consultation with my client yesterday, and as a result of this he stated that he desires to amend his petition

by adding an additional claim based on the facts therein. He has signed that, and I have it here. I ask simply your Honor's direction as to whether I can now file it and serve a copy on the United States Attorney.

The Court: I think it all goes as part of your papers. I think it should be submitted to the District Attorney. If [fol. 280] you want to submit it now, you may do so.

Mr. Meyers: I will submit it now, since your Honor is aware of the circumstances which made me come in late with it.

The Court: It will be accepted, and I direct that it be so accepted. Whether it is taken here or upstairs, there won't be any problem about it. You are entitled to file it.

Mr. Bloch: If Judge Kaufman is not persuaded to hear this application, it is going to come back here.

The Court: I cannot indulge in any assumptions, but I would assume that the matter would be referred to either the criminal motion part or perhaps to be disposed of by the Chief Judge. I do not know what the disposition would be on that.

[fol. 281] IN UNITED STATES COURT

C. 134-245

UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG and MORTON SOBELL

Stenographic Minutes

Before: Hon. Irving R. Kaufman, District Judge.

New York, November 26, 1952;
11:45 o'clock a.m.

APPEARANCES:

Myles J. Lane, Esq., United States Attorney for the Government; by Roy M. Cohn, Esq., Special Assistant to the Attorney General, and James B. Kilsheimer, III, Esq., Assistant United States Attorney.

Emanuel H. Bloch, Esq., Attorney for Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Esq., Attorney for Morton Sobell.

[fol. 282] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Cohn: Your Honor, may I apologize for the interruption in the calendar, but Judge Weinfeld has referred to your Honor motions by the petitioners Julius and Ethel Rosenberg and Morton Sobell brought under Section 2255 addressed to the judgment of conviction and sentence.

The initial issue to be determined, your Honor, is whether or not a hearing should be had, and on that point the Government, Mr. Kilsheimer in particular, is now prepared to argue in opposition to a hearing.

The Court: Are you both ready?

Mr. Bloch: No, you see, your Honor, I intend, according to instructions from my clients, to cause to be filed before you an affidavit of bias and prejudice and ask you to disqualify yourself from hearing this application.

As the Court is well aware, my clients are in the death house in Sing Sing. I think the proper procedure would be to have that affidavit filed prior to any action that may be taken before the Court.

The Court: Why have you delayed it this long?

Mr. Bloch: I will tell you why, because I did not think it was going to come before your Honor, and, you know in the light of the history of last week——

[fol. 283] The Court: You are a very able lawyer. You read Section 2255 and you know the history of 2255.

Mr. Bloch: It is precisely because I know the history of 2255 that I believed, and I so argued, that this matter should properly have come before the judge that was sitting in the Criminal Part.

The Court: You do?

Mr. Bloch: I honestly do.

The Court: Don't you realize that the purpose of the enactment of Section 2255 instead of the old procedure of habeas corpus is so that it would go before the judge who imposed sentence?

Mr. Bloch: Not the judge, the sentencing court. As a matter of fact, I read the Hayman case——

The Court: I have read the Hayman case, too.

Mr. Bloch: I assume that you have, and it was as a result of my understanding of the Hayman case that I believe that these applications were required to be made in the court in which the trial was conducted and in which the sentence was imposed.

The Court: Let me ask you this. How about motions for new trials?

Mr. Bloch: Yes, on motions for a new trial, I agree that [fol. 284] they should properly, in the proper exercise of discretion, go before the sentencing judge.

The Court: What happens in that case if a motion for a new trial is made and the petitioner files an affidavit of prejudice before that judge?

Mr. Bloch: I submit that where an affidavit of bias and prejudice is properly filed and the ground asserted therein are proper ones——

The Court: On a motion for new trial?

Mr. Bloch: Yes. I say if they are proper grounds, then I believe that the sentencing judge would have to disqualify himself. I think that is a sine qua non for any kind of proper procedure.

In this case, your Honor, I assure you that I am not looking for a delay here in view of the date that has been set for execution, but in a serious matter of this kind, I don't want any rights of the petitioner waived.

I will do this. I will hire a car and go up to Sing Sing and prepare an affidavit on the way.

I just want to dispose of this as expeditiously as possible.

The Court: Very well.

Mr. Bloch: But in light of the impending death of these [fol. 285] petitioners, I submit that I should be required to have sufficient time to have proper papers filed before the Court to adequately protest my clients' contentions and interests.

The Court: I think that certainly from your record in this case, nobody is going to ever accuse you of not filing the proper papers in this case.

Mr. Bloch: Thank you very much, your Honor.

I would also like to say this. I know that your Honor, of course, being the trial judge, is fully acquainted with the

record. You have a good memory, and it would not require very much discussion to refresh your recollection as to certain salient features of the testimony which will impinge upon some of the contentions raised in this application.

However, it is mostly matter that is dehors the record. There is a 110-page petition I have submitted to your Honor with hundreds of exhibits, and I think that for the Court's own edification, you might want to read these papers before you hear oral argument.

So under all the circumstances, I would suggest that since tomorrow is Thanksgiving Day, and there is going to be no notary up at Sing Sing to take any signatures of the petitioners, that this matter go over to Monday or [fol. 286] Friday afternoon.

The Court: I would rather hear it Friday afternoon.

You could possibly go up there this afternoon, couldn't you?

Mr. Bloch: They only allow you in until 3 o'clock.

The Court: Couldn't they have a notary available then?

Mr. Bloch: There will be a notary there.

The Court: How about tomorrow?

Mr. Bloch: No, tomorrow there will be no notary there.

The Court: Can't they arrange to have a notary present?

Mr. Bloch: I would have to call the warden. I doubt it. I think the only notary at Sing Sing is the assistant to the warden and the warden, and they are usually away on holidays.

What I could do—and this is going to make it pretty close—is write an affidavit in the automobile going up to Sing Sing, but I would prefer not to be squeezed as closely as that.

The Court: Time is of the essence.

Mr. Bloch: That is correct.

[fol. 287] The Court: I am sure your clients are anxious to have a determination and a finale; and, while we all believe they had it when your remedies were exhausted in the Supreme Court, you have this proceeding here now and you are entitled to have a determination of this proceeding.

If the affidavit of prejudice has merit, then of course there will have to be another judge. If it doesn't have merit, I think the law requires me to rule on the sufficiency of it.

You agree with that, Mr. Bloch? That is the law. You nod your head. I want you to say either yes or no.

Mr. Bloch: I am sorry, I didn't know I was talking for the record. I am — accustomed to being a witness.

I think that is substantially the law; and if you make an improper determination, I have my remedy. But initially the determination on the affidavit of bias must be yours.

The Court: Did you want to say something?

Mr. Cohn: Yes, I was just going to say this.

This arrangement suggested by Mr. Bloch is perfectly agreeable to the Government.

The only request I would make—and I assume I can [fol. 288] work this out with Mr. Bloch privately—is that I would like to get a copy of the affidavit he will file some time tomorrow. We can work out the details so that we will not be in a position of having to ask for delay.

The Court: I think that is fair. Maybe Mr. Bloch would sit down and tell you generally and specifically what he wants to cover.

Mr. Cohn: We can work that out, and we will be ready then to be heard on the affidavit of prejudice at whatever time you might fix.

The Court: 2:15 Friday.

Mr. Bloch: Just so that there will be no doubt, I would prefer in the light of the time element today that I tell Mr. Cohn what I believe will be the substance of the affidavit and the grounds that will be urged.

The Court: Yes, you do that.

Mr. Bloch: I will formulate the affidavit in accordance——

The Court: Do it as soon as you leave here.

This matter is adjourned to 2:15 p. m. Friday.

Mr. Meyer: Your Honor, my name is Howard N. Meyer and I am a member of the bar. I am of counsel in the case of United States of America v. Morton Sobell. Sobell is [fol. 289] sometimes lost sight of, and I just want to call to your Honor's attention——

The Court: He has not been lost sight of by this Court.

Mr. Meyer: I misspoke myself. What I mean is that Mr. Cohn did not mention, and I don't know whether your Honor is aware, that there are separate sets of papers in

United States v. Sobell, also relating to the 2255 proceeding.

The Court: And is there an affidavit of prejudice being filed by Sobell?

Mr. Meyer: An affidavit of prejudice will be filed in that matter.

The Court: If you have a copy ready, will you give a copy to the clerk?

Mr. Meyer: I do have it ready. I was obliged to have it ready in view of developments of the last few days.

The Court: Do you want to file it, please?

I think what we might do with this as well is put it over until Friday.

Mr. Meyer: I was about to suggest that, that I would request that your Honor hold this until you receive Mr. Bloch's affidavit and consider it together plus any further argument as we may feel disposed to make as to whether or not you should hear this matter.

[fol. 290] The Court: Very well.

Mr. Meyer: Will that be here or in your chambers, your Honor?

The Court: It will be here.

(Adjourned to November 28, 1952, at 2:15 p.m.)

[fol. 291] IN UNITED STATES DISTRICT COURT

C. 134-245

UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG, and MORTON SOBELL

Stenographic Minutes

Before:

Hon. SYLVESTER J. RYAN, District Judge.

Held in Room 618, Federal Court House, New York, November 28, 1952; 3:00 o'clock p. m.

APPEARANCES:

Myles J. Lane, Esq., United States Attorney, for the Government; Myles J. Lane, Esq., United States Attorney, and James B. Kilsheimer III, Esq., and Robert Martin, Esq., Assistant United States Attorneys.

Emanuel H. Bloch, Esq., Attorney for Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Esq., Attorney for Morton Sobell.

[fol. 292] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What is this matter, gentlemen?

Mr. Bloch: If the Court please, may I give you a brief summary of the application which is now before you, as well as some of the prior history so that you can comprehend fully and precisely why we are here?

The Court: Well, who sent you here?

Mr. Bloch: I was going to tell you that.

The Court: All right.

Mr. Bloch: Judge Irving Kaufman, who was the sentencing judge in this case, has referred this matter to you.

This matter is an application by petitioners for relief under Section 2255 of Title 28 of the United States Code.

They were convicted of conspiracy to commit espionage

and sentenced to death. Their execution date has been refixed for the week commencing January 12, 1952.

Now, this application before you was brought on by an order to show cause which was signed by Judge Weinfeld sitting in the Criminal Part, and made returnable before him sitting as the judge in the Criminal Part on November 26th. On that morning Judge Weinfeld believed that the matter should be referred to Judge Kaufman who was the sentencing judge. There was some argument on that [fol. 293] question of referral. However, it was decided adversely to the petitioners.

When we appeared before Judge Kaufman I indicated to Judge Kaufman that the petitioners desired that he disqualify himself and asked him for leave to permit me to go to Sing Sing and have my clients submit an affidavit of bias and prejudice. The matter was then set down for 2.15 this afternoon before Judge Kaufman.

We arrived at the courthouse, Room 506, before Judge Kaufman, and I submitted the affidavit of bias and prejudice. Judge Kaufman took the matter under advisement and in about ten or fifteen minutes after deliberation rendered an opinion in which he held that the affidavits are insufficient under Section 144 of Title 28, but that as a matter of judicial discretion he would excuse himself, and he stated further that after consultation with Senior Judge Knox of this court, that the matter was to be referred to you, and I think that is where we stand at the present time.

The Court: Now, am I right in understanding that this motion in the case of United States v. Julius Rosenberg and Ethel Rosenberg has been assigned to me by Judge Knox for hearing, Chief Judge Knox, for hearing?

Mr. Bloch: That is correct, your Honor.

Mr. Lane: May I say that it was referred by Judge Kauf- [fol. 294] man to you, but to all intents and purposes under instructions from Judge Knox.

The Court: It has to be assigned to me by the Chief Judge.

Mr. Lane: For the record he stated that he had consulted with Judge Knox.

The Court: All right.

Mr. Lane: And that Judge Knox had designated you as the Judge to hear it.

The Court: Mr. Bloch, you represent Julius Rosenberg and Ethel Rosenberg?

Mr. Bloch: That is correct.

The Court: Who represents Morton Sobell?

Mr. Meyer: If your Honor please, my name is Howard Meyer and I am here as counsel for Morton Sobell on a separate proceeding which has gone through the same course of procedure just outlined by Mr. Bloch, except the petition, although a separate petition has certain things in common with the Rosenberg petition, but I take it, if your Honor pleases, that we are here to determine a time for the hearing of argument on these petitions.

The Court: Well, I don't know, but first let me hear from Mr. Lane as to what he has to say, and I will see what I have to determine but I do not know as yet.

Mr. Lane: Well, your Honor, Mr. Bloch has stated the [fol. 295] situation I think quite accurately and the thing to do now is to set a time when your Honor can hear the motion.

The Court: Well, is it contemplated that any oral testimony is to be presented?

Mr. Bloch: The relief asked for, your Honor, is an order invalidating the sentences as a matter of law, or in the alternative, if the Court feels that a hearing is required, that a hearing be held, in which event, of course, oral testimony will be required to substantiate the allegations of the petition.

I do not know at the present time whether the United States Attorney's office intends to admit all of the allegations of the petition, or whether they intend to controvert some of the allegations.

The Court: Irrespective of what the intention of the United States Attorney's office is, have you any oral testimony that you ask the Court to receive at this time?

Mr. Bloch: At this moment?

The Court: Yes.

Mr. Bloch: Not at this moment, your Honor, but we have a suggestion to the Court——

The Court: I assume then that all the matters upon which [fol. 296] you rely for relief are embraced and set forth in the voluminous papers annexed to the order to show cause?

Mr. Bloch: That is correct. It is a hundred-page petition, your Honor——

The Court: All right.

Mr. Bloch: —with 150 or 200 exhibits.

The Court: May I ask the same question of you, Mr. Meyer? Is that so?

Mr. Meyer: Yes, but may I state my understanding of the statute——

The Court: No, no, please.

Mr. Meyer: What I mean is that these papers——

The Court: I don't want any statement as to your understanding of the law.

Mr. Meyer: On the procedure, because, as I understand it, there has to be an initial determination to be made on these papers.

The Court: First I want to know whether on the hearing of this order to show cause at this time you desire to submit any oral proof.

Mr. Meyer: Not at this time, your Honor.

The Court: All right. I assume then that at the present time you rest upon the papers which are annexed to the order to show cause.

Mr. Meyer: That is correct, your Honor.

[fol. 297] The Court: Are there any answering affidavits that the Government desires to submit?

Mr. Lane: Yes, we have answering affidavits.

The Court: I suggest that they be handed up now.

Mr. Lane: Your Honor, our answering affidavits will not be completed until Monday.

The Court: Monday what time?

Mr. Lane: Say ten o'clock.

The Court: Then suppose I do this: I would like to read through these papers before I hear this motion, and all affidavits. Therefore, I will put the matter down for two o'clock Monday before me and you will have your answering affidavits submitted and filed with the Court by, say, half past ten Monday morning.

Mr. Lane: Yes, your Honor.

The Court: And served upon the defendants then, giving them a copy of them.

Mr. Lane: Yes, sir.

The Court: We will put the matter down for two o'clock —what room?

The Clerk: Room 905, your Honor.

The Court: —Room 905, two o'clock, Monday afternoon, the answering affidavits to be filed by the Government [fol. 298] with the Court by 10.30 Monday or eleven o'clock.

Mr. Lane: I think eleven o'clock would be better.

The Court: All right, eleven o'clock Monday morning.

Mr. Bloch: If the Court please, may I ask your advice?

The Court: Certainly.

Mr. Bloch: Of course, I don't know what the answering affidavits of the United States Attorney's office will contain, but there obviously are many facts which have to be proved to sustain the allegations of the complaint. Do you suggest in the interest of expediency that a pretrial conference be held so that we can limit and simplify the factual issues?

The Court: Well, I may determine upon the reading of the papers that oral testimony is not necessary. None is offered now and the Court may decide that it will not or does not require witnesses, or it may direct that they be called.

Mr. Bloch: Well, the reason I ask that, your Honor——

The Court: I do not see any need for any pretrial conference. I do not think that these applications will resolve themselves into a trial at this time.

[fol. 299] Mr. Bloch: Well, you see, your Honor, what concerns me is the following:

If the Court, for instance, holds that as a matter of law my petition is insufficient then, of course, there will be no hearing. If, on the other hand, the Court holds that my petition on its face does state a case for the relief that we request and some of the facts alleged in our petition are controverted by the District Attorney's office, I must assume that therefore factual questions will be presented to the Court which will require hearing.

Now I just don't want to be embarrassed before your Honor by not being ready at eleven o'clock Monday or two o'clock Monday.

The Court: No, two o'clock.

Mr. Bloch: I mean two o'clock, with proof to sustain these allegations.

The Court: I don't know nor do you know what the answering affidavits——

Mr. Bloch: No, I do not.

The Court: ——of the Government will contain.

Mr. Bloch: No, I do not. All right.

The Court: Nor do I at this time know what your affidavits contain. So I suppose the orderly way to proceed [fol. 300] would be to leave these papers with me. I will read them over the week end. We will have the Government's affidavits or such papers and documents as they feel required to submit, submitted by eleven o'clock on Monday, and I will hear you all at two o'clock. At that time if it becomes necessary to hear argument or to take testimony I will determine it then.

Mr. Bloch: All right.

The Court: At this time there is no request on the part of the defendants for the taking of testimony and it may not be necessary to hear testimony.

Mr. Bloch: I just do not want to be accused of impeding the administration of justice if I am not ready at two o'clock on Monday to have the witnesses before the Court.

The Court: I do not think anybody has accused you, so don't you be——

Mr. Bloch: I don't want to accuse myself. Let us put it that way.

The Court: Don't accuse yourself unless there is some basis for it, but nobody has accused anybody here and I am not going to permit unwarranted or unfounded accusations to be made before me.

Mr. Meyer: May I add a word, your Honor?

The Court: Yes.

Mr. Meyer: I would simply like to state that the reason [fol. 301] no oral testimony is tendered at this time is because in the opinion of counsel the Court must first make a ruling on whether or not a hearing is to be had on the papers submitted.

The Court: But at this time you do not desire to offer any oral testimony?

Mr. Meyer: That is correct.

The Court: As I understand it, the position of the defendants is that the sole basis for the application that they now make is contained in the affidavits annexed to the order to show cause.

Mr. Meyer: That is correct, your Honor.

The Court: Is that correct?

Mr. Block: I believe that is correct, your Honor, because any oral testimony would merely go to prove the allegations.

The Court: To support the statements that are in these affidavits?

Mr. Bloch: That is correct.

The Court: Now, I do not know what they contain but I will read them with the help of the Lord over the week end and then you may come in at two o'clock Monday in Room 905. All right, gentlemen.

Mr. Bloch: Thank you, your Honor.

Mr. Meyer: Thank you.

[fol. 302] Mr. Bloch: Your Honor, I am very sorry, but there is just one thought. I think that the proper practice in a situation like this in order to enlighten the Court is to have some memorandum submitted, but what worries me is that in the chaotic state of the pleadings as it were, there is nothing I can say to the Court which may be completely accurate. Now——

The Court: Counsel, you may submit any memorandum that you desire, provided you give a copy of it to the United States Attorney, and they may likewise submit any memorandum that they desire, and that is provided they give a copy of it to you, or to the attorney for Sobell.

Mr. Bloch: Yes.

The Court: However, I don't anticipate that any memorandum is going to be necessary. On any problem of law I make my own research on it. The factual determinations I am coming to by my own reading of the papers submitted. Now, if you feel that you can be of help in pointing out some law that you think the Court does not know about I will be glad to have you do that.

Mr. Bloch: No, it is not that I do not think the Court does not know the law or may not find it, but it is very difficult to formulate propositions of law with the state of the pleadings as they are now.

[fol. 303] The Court: That is one of my tasks to do, but if you want to submit a memorandum you may do so. It is not necessary, or it is not required of either side by me.

Mr. Bloch: I was just wondering whether the submission of a memorandum might not be premature at the present time.

The Court: If you have a memorandum now I will be very glad to receive it.

Mr. Bloch: I have not it now, no.

The Court: Have you?

Mr. Meyer: No.

Mr. Bloch: Not at the moment.

The Court: If you want to submit one tomorrow or Monday morning I will be glad to look at it provided you give a copy to the other side.

Mr. Bloch: Thank you very much.

Mr. Meyer: Thank you, your Honor.

The Court: All right.

(Adjourned to Monday, December 1, 1952, at 2.00 p.m.)

[fol. 304] In United States District Court

c. 134-245

United States of America

vs.

Julius Rosenberg and Ethel Rosenberg and Morton Sobell

Stenographic Minutes

Before:

Hon. Sylvester J. Ryan, District Judge.

Held in Room 905, Federal Court House, New York, December 1, 1952; 2:00 o'clock p.m.

Appearances:

Myles J. Lane, Esq., United States Attorney, for the Government; Myles J. Lane, Esq., United States Attorney, and

James B. Kilsheimer III, Esq., and Robert Martin, Esq., Assistant United States Attorneys.

Emanuel H. Bloch, Esq., Attorney for Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Esq., Attorney for Morton Sobell.

[fol. 305] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Are you ready?

Mr. Bloch: I am not. I was served with the Government's papers at about 1:35. 25 minutes ago, as I was about to leave my office on my way to court. The opposition affidavits are rather extensive, at least, quantitatively speaking. I have not had a chance to read them and I certainly have not had a chance to digest them. I must assume without looking at them that they present certain factual questions which will probably require reply affidavits. Therefore, I submit that I cannot argue this application intelligently before you until I know what the opposition has stated and what it contends. Even though I am running against a deadline here because the date of the execution has been set, I think in the interests of justice and to properly represent my clients I will need a few hours at a minimum to read the Government's opposition affidavits and have a chance to reply, if I deem it expedient and necessary.

The Court: What is your application?

Mr. Bloch: That this matter be put over until tomorrow morning.

The Court: Does the Government desire to be heard?

Mr. Kilsheimer: We have no objection to that. We were [fol. 306] a bit tardy in serving our affidavits on defense counsel due to stenographic problems that we ran into in our internal organization. At any time your Honor is ready to go ahead with the matter, we are prepared.

The Court: Mr. Bloch says he is ready to go ahead tomorrow morning.

Mr. Bloch: I estimate that if I can get back to my office in 20 to 25 minutes——

The Court: Where is your office?

Mr. Bloch: Down near Canal Street. It is not very far from here.

— and have an opportunity to read the papers, which probably will take me about an hour to read and analyze, I then will be ready to submit any reply affidavits that might be required.

The Court: I think your request is a fair request. I will hear you tomorrow morning at 10 o'clock.

Mr. Bloch: I wonder whether the Court could make it 11. I will tell you the difficulties I am working under——

The Court: I think I can. 11 o'clock is all right.

I noted from your affidavits, which I read over the week-
[fol. 307] end, and the affidavit annexed to the order to show cause of the defendant Sobell, that reference was made to numerous newspaper publications. They were listed and indexed by exhibit numbers. Are photostats of those publications available?

Mr. Bloch: They were submitted with the moving papers. They were submitted to Judge Weinfeld, I would expect in the regular course Judge Weinfeld sent them to Judge Irving Kaufman and Judge Irving Kaufman sent them to you.

The Court: I don't have them. I will check up on that.

The second matter I have in mind, I would like to have submitted a copy of the record of appeal that went to the Court of Appeals.

Mr. Bloch: That was submitted together with those newspaper photostats.

The Court: I would like to have copies of the briefs that were submitted to the Court of Appeals in this Circuit and I would like to have any copies of briefs that were submitted to the Supreme Court on the application for certiorari.

Mr. Bloch: When do you desire those?

The Court: As soon as convenient.

Mr. Bloch: I will try to get them for you this after-
[fol. 308] noon.

The Court: If you can, I will appreciate it; if you can't, the first thing in the morning.

Now, I think the Court would be assisted if counsel for the defendants in both cases prepared just a brief summary of the points that they now urge in support of this application under Section 2255. I don't mean by that a

detailed analysis of it, but just a brief and summary statement. What I had in mind is something like this: We urge that the defendants' rights were prejudiced:

1. By pretrial publications.
2. By publications when on trial.
3. By testimony of Greenglass—Is that the name of the man who drew the picture?

Mr. Bloch: That is right.

The Court: In that fashion I would like a statement conveniently of the points that you urge now and which you contend are amplified and set forth in greater detail by the affidavits which are annexed to the order to show cause.

Do you understand what I have in mind?

Mr. Bloch: Yes. I would just like to clarify it. Do you want any argumentation of law?

The Court: Not in that, just a brief and concise state-
[fol. 309] ment of the grounds now urged by the defendants in support of this application under Section 2255.

Mr. Meyer: If your Honor please, I would like to say——

The Court: I will give you ample opportunity for any argument as to the law.

Mr. Meyer: —my papers are cast in a somewhat different form from Mr. Bloch's. Sobell's papers contain a preliminary petition separately from the affidavit directly under the order to show cause, and in this petition, in paragraph 5, I believe, there is a summary along the lines that your Honor has indicated of the nature of the points.

The Court: There is somewhat of a summary on behalf of the defendant Sobell. It incorporates by reference the points which have been urged or are urged by the defendants Rosenberg. For that reason I think the Court would be assisted if I did get a concise statement of the points now urged in support of this application. I will give you both an opportunity to be heard on the law tomorrow if the occasion arises, or as soon thereafter as it becomes advisable to hear you.

Mr. Bloch: I assume that your Honor is giving me per-
[fol. 310] mission to submit and file reply affidavits.

The Court: You may have until tomorrow morning at 11 o'clock to submit any affidavits, either in the nature of reply

or in the nature of amplification of what is contained in the original papers you submitted. You may also submit any memorandum of law that you desire, provided you give a copy to the United States Attorney.

Mr. Meyer: If your Honor please, I have here and I can hand up the petitions of the Supreme Court submitted on behalf of the defendant Sobell. If your Honor is desirous of the Government's brief in opposition, you will request that of the Government.

The Court: Yes. Mr. Lane, you will see that I get it.

Mr. Bloch: There is one petition that I think your Honor has omitted to mention as being desirous of obtaining, and that was the petition submitted to the Supreme Court of the United States for reargument or for a rehearing after the denial.

The Court: I intended to include that. That is the petition in which there was a memorandum decision by Mr. Justice Frankfurter?

Mr. Bloch: Yes.

The Court: Yes, I intended to include that. I would like [fol. 311] to have a complete record of the documents that were before the Supreme Court, either by way of petition or record or briefs, and the same with reference to the Court of Appeals.

Mr. Bloch: There was a memorandum opinion, as your Honor correctly stated, by Mr. Justice Frankfurter.

The Court: I don't know whether I correctly described it as a memorandum opinion.

Mr. Bloch: I think that is an adequate description.

The Court: I have a copy.

Mr. Bloch: Now, there is one request I would like to make at the present time. I think it is quite apparent that this motion is a serious one and

The Court: Every motion in every criminal case is a serious matter to the Court.

Mr. Bloch: Should I say specially serious, your Honor, in view of the date that has been set here for execution. Now, I don't know, and I think I am reasonably secure in stating, I don't think your Honor knows how long it may take to ultimately determine any issues of law and fact which may be involved in this proceeding. I would like to

ask your Honor to grant me a stay of the execution until [fol. 312] the determination of this application by your Honor.

The Court: Your application is denied. I see no reason for stay of execution of judgment at this time.

Mr. Bloch: That is without prejudice?

The Court: You may make application for a stay at any time. Tomorrow morning, then, gentlemen, at 11 o'clock in this courtroom.

(Adjourned to December 2, 1952, at 11 o'clock a.m.)

[fol. 313] COLLOQUY BETWEEN COURT AND COUNSEL

UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG and MORTON SOBELL.

New York, December 2, 1952;
11:00 o'clock a.m.

Hearing resumed.

Mr. Meyer: If your Honor please, before the proceedings commence I would like to hand up a reply affidavit which has been served on the United States Attorney.

The Court: This is on behalf of the defendant Sobell.

Mr. Meyer: A brief memorandum on one point, and the outline which your Honor requested yesterday afternoon.

Mr. Bloch: If your Honor please, I have already submitted to the clerk my reply affidavit, which has been served on the United States Attorney.

The Court: All right. Are you ready, then, to proceed on these papers?

Mr. Bloch: I am, sir. Does the Court want a statement or argument?

The Court: I will hear argument from both sides on the merits of this matter. I see no necessity for taking any oral testimony. Do you?

[fol. 314] Mr. Bloch: Yes, I do.

The Court: Do you desire to offer any testimony?

Mr. Bloch: I believe that oral testimony is necessary in the light of the opposition's affidavits. I think there are factual questions that are presented for the Court's determination that can only be resolved by taking oral testimony.

The Court: What witnesses do you offer to the Court?

Mr. Bloch: I will offer in connection with the first point on pretrial publicity, in the light of the Government's denial that the authorities fed information to the press and stimulated the climate about which I complain. Newspaper reporters——

The Court: What newspaper reporters?

Mr. Bloch: From all the metropolitan dailies, as well as newspaper reporters from the Washington papers, U. P., and A. P. I wish to demonstrate that Mr. J. Edgar Hoover, the head of the FBI, and Mr. McGrath, who was formerly Attorney General, and who was Attorney General at the time these petitioners were arrested, issued a joint statement from Washington, and that Mr. Saypol here in New York and his assistants from time to time, especially at [fol. 315] or about the time of the arrest of the petitioners and thereafter up to the time of their trial, made statements to the press that had the effect of further inflaming the public atmosphere and further prejudicing the petitioners in the eyes of the public.

Now, if the Government is willing to admit that these authorities did make the statements that I allege they made in the petitions, there will be no necessity for any oral testimony on that point. But in the state of the record now because of the denials of the opposition's affidavit, I submit that a factual question has been presented and the burden is upon me to prove to the Court the truth of the allegations of my petition.

Now, on the second point—

The Court: As to that first offer of proof, at this time I rule it is unnecessary for the Court to take oral testimony in connection with that claim.

Mr. Bloch: If the Court please, this is a rather novel proceeding. I must concede this is the first time I appeared in one.

The Court: Novel in what respect?

Mr. Bloch: Novel to me, because this is the first time I appeared for a client in a 2255 proceeding, and I should take an exception—

[fol. 316] The Court: No, you don't have to take an exception. The mere filing of an appeal, if you decide to appeal, if I should rule adversely to you on this motion, would be sufficient to protect your client's rights at this stage.

Mr. Bloch: I just want to make sure that I was protecting my record.

The Court: I am not ruling on the matter yet, but I say if I should rule and make an order and then you file a notice of appeal, it would bring up for review all of my rulings with respect to declining to accept proof, oral proof.

Now, may I ask whether or not you have submitted any affidavits from any of these individuals whom you expect to call as witnesses?

Mr. Bloch: No, I have not. I want to call this to your Honor's attention.

The Court: Do you desire to submit any affidavits from any of these individuals?

Mr. Bloch: I will tell you why I think it is unnecessary.

The Court: Mr. Bloch, please. Listen to my questions and then respond. I think we will get along better. Do you desire an opportunity to submit affidavits from any of these individuals whom you stated that you would offer [fol. 317] testimony from on this hearing?

Mr. Bloch: Will your Honor bear with me one second?

The Court: Surely. Are these members of the bar (referring to a man and woman coming from a bench to the counsel table)? If they are, you might note their appearance.

Mr. Bloch: One of these is my father.

The Court: He is welcome to sit at the table there with you. If you want to put his name on the record, you may do so. Otherwise, he may sit at the table there.

Mr. Bloch: Thank you. Your Honor, I would like to respond as directly as I can to your question. In the light of the Court's ruling, my disposition is to be permitted time to submit affidavits from these various newspaper sources. I say that, your Honor, with tongue in cheek, because some or many of these witnesses may not be friendly, and I may

not be able to procure voluntary statements in the form of affidavits from them. If that eventuality comes about, my only method of bringing before the Court this type of testimony would be to subpoena these newspaper persons. I say that, your Honor, because I want you to take my statement in context with the state of the affidavits.

[fol. 318] The Government does not deny that the newspapers did print certain articles which are contained in Exhibits 2 to 15 annexed to the petition; they merely deny that the authorities stated to the press some of the things which were attributed to them as recounted in these various newspaper stories.

The Court: You see, counsel, in a proceeding of this nature the Court can't enter upon a general exploratory inquiry here to find out whether or not these things did occur, unless there is some basis in fact submitted by you which would justify such an inquiry. Now, the affidavits that you have thus far submitted, and I have not read the affidavits that you submitted this morning, you don't make such a showing. How long would you want to submit additional affidavits on this matter?

Mr. Bloch: May I make this preliminary statement before I respond? I would just like to call to the Court's attention that I have submitted as exhibits here photostats of newspapers circulating in the metropolitan area. I have assumed that the Court, as well as everybody sitting in this courtroom, takes it that these newspapers are responsible institutions and do not quote lightly the remarks of responsible Government officials. So that I don't believe that I [fol. 319] can be accused of trying to conduct a fishing expedition. I think on the face of it it would appear that these various Government officials did make the statements attributed to them by the newspapers.

The Court: I have not examined the voluminous newspaper articles that you have submitted. I have not done that as yet. I intend to do so. But would you respond now to my inquiry?

Mr. Bloch: In the light of that fact I am very hard put, your Honor. I don't want to give myself an insignificant amount of time, because I don't think I will be able to procure these affidavits within less than two or three days or even a week. It would entail a trip to Washington. It

would entail tracking down the particular newspaper reporter who interviewed or was interviewed by the various public officials.

The Court: Counselor, you can't unduly delay the process of law here. Sentence has been imposed and was imposed some time ago upon your clients. Appeals have been intervened. The Court of Appeals and the Supreme Court of the United States have passed on this matter. You have had ample opportunity to get these affidavits and submit such proof as is available to you in support of this application you are now making.

[fol. 320] These newspaper articles that you refer to in your motion papers, most of them, if not all of them, were published at least a year or a year and a half ago. I will give you 48 hours to submit any affidavits that you desire, because it will take me a good deal more than that to read the documents and papers that have been submitted in connection with your motion. I will give you until Friday morning. That is a little more than 48 hours to submit such additional affidavits as you desire.

Mr. Bloch: May I say to the Court that I was a little surprised and shocked when I found Mr. Lane's opposition affidavit controverting the fact that various public officials gave statements to the press. I did not think that the Government was going to dispute that. That is why I did not serve subpoenas on these various newspaper reporters; nor did I procure their affidavits in advance.

The Court: There will be no service of any subpoenas upon anybody in this proceeding without direction from the Court.

Mr. Bloch: I understand that, your Honor.

The Court: I will give you until Friday at 12 noon to produce affidavits on this.

[fol. 321] Now, what other witnesses have you?

Mr. Bloch: Before we leave this topic, if by Friday morning I am unable to procure the affidavits which are relevant to this particular discussion, I renew my offer of proof to subpoena these various witnesses before the Court so that they can be compelled involuntarily, if you want, to bring before the Court the facts which I allege in my petition.

The Court: I assume if you do not submit affidavits from

these witnesses whose identities are not disclosed to the Court at this time by you, that you will in affidavit form disclose the identity of these witnesses whom you request the Court to call and accompany the disclosure of the identity of the witness, of the prospective witness, of a brief statement of what you would have this witness testify to if called, and that would be done by 12 o'clock Friday if affidavits are not submitted.

Mr. Bloch: I repeat to the Court that I will take every reasonable step to procure the names of these various newspaper reporters who were present at these various interviews. Now, also, in connection with the first point I would like to offer proof from an expert in the area of mass psychology and mass psychological reaction with respect to the effect upon the public of the voluminous pretrial pub- [fol. 322] licity which preceded the trial of these petitioners.

The Court: You mean one of these so-called poll experts?

Mr. Bloch: I don't know whether I would vulgarize it that way.

The Court: I don't think your characterization of vulgarize is proper. I don't think it was well put. I don't think it is appropriately made.

Mr. Bloch: Then, your Honor, will you give me the opportunity to submit the affidavit from such an expert? I have a different idea about it.

The Court: You may have the opportunity to submit such an affidavit for the purpose of perfecting or completing the record that you desire to make. Such an affidavit must be submitted not later than 12 o'clock Friday.

Mr. Bloch: And if I am unable to procure such an affidavit after the exercise of reasonable diligence, I will renew my offer to subpoena a person in that field to give oral testimony before the Court concerning the subject.

The Court: I will rule now that I will refuse to accept such testimony. I am only permitting you to submit an affidavit from such an individual in order to complete your [fol. 323] record in this proceeding, a record that you feel should be made.

Mr. Bloch: Now, with respect to point 2, which is the point dealing with the knowing use of perjured testimony by the Government, in connection with the first subdivision

of that point dealing with the alleged cooperation of the main Government witness, David Greenglass, with the authorities at or about the time of his apprehension and arrest, I offer to call by subpoena Supreme Court Judge Irving Saypol, who was formerly the United States Attorney for the Southern District of New York at the time these petitioners were arrested and tried. I also offer to call by subpoena Judge Irving R. Kaufman, the trial judge. I don't know whether the Court has read my reply affidavit.

The Court: The one submitted this morning?

Mr. Bloch: That is correct.

The Court: I only received it about half an hour ago, about ten minutes before this proceeding began. I have not completed reading it.

Mr. Bloch: I did not expect your Honor to have completed it. I just want to advert to it for a moment to try to make the Court understand why I am offering to call Judge Kaufman. The Government raised a question of [fol. 324] waiver in connection with the Pearl indictment and there was a colloquy that occurred during the trial of the petitioners in which Mr. Saypol, defense counsel, and the trial judge participated.

The Court: Was that colloquy reported?

Mr. Bloch: It was not. It was an off-the-record colloquy, and the substance of my contention is that it was on the basis of a representation made by Mr. Saypol that the petitioners did not move for a mistrial because of the timing of the indictment of William Pearl.

Now, in order to prove my statement, I submit that it is indispensable that Judge Kaufman, who participated in that conference, and Mr. Saypol, as well—incidentally, the various defense counsel can be subpoenaed to give testimony before the Court; I doubt very much whether Judge Saypol will voluntarily give me a statement; I doubt very much whether Judge Kaufman will voluntarily give me a statement in the form of an affidavit—that is why I think it is necessary that they be subpoenaed.

The Court: Have you set forth your version of this off-the-record discussion and rather unusual conference.

Mr. Bloch: Yes, I have in my reply affidavit, your Honor.

[fol. 325] The Court: I decline to permit you to call to

take testimony from either of the individuals whom you have mentioned on this point.

Mr. Bloch: Now, I also require the testimony of Mr. Saypol, now Judge Saypol, with respect to the point of cooperation of Greenglass with the authorities, and that is necessary in connection with certain statements that Mr. Saypol made after the trial of these petitioners had been concluded, from which the inference can be clearly drawn that there was suppression of material evidence during the trial of these petitioners, and that suppression was knowingly connived at by the prosecuting officials.

The Court: What evidence do you claim was knowingly suppressed by the prosecuting authorities?

Mr. Bloch: I say the evidence that was suppressed by the prosecuting authorities is the fact that Greenglass was permitted to testify at the trial that immediately upon his apprehension he cooperated with the authorities; the fact is, he did not. The fact is that Mr. Saypol stated after the trial that it was only later that there was a recantation of the protestation of innocence of Greenglass. Now, that is quite inconsistent with the testimony of Greenglass that [fol. 326] he cooperated with the authorities, and I think this was a very salient point in connection with Greenglass's credibility.

The Court: Greenglass testified as a witness, did he?

Mr. Bloch: He did.

The Court: He was subjected to cross-examination by the defendants?

Mr. Bloch: He was.

The Court: Was he cross-examined on this one subject?

Mr. Bloch: Partially, but the point is that there were facts which did not come to the attention of the petitioners, to me, until after the trial, and it was only upon the disclosure of those facts coming out of the mouth of Mr. Saypol that we realized the perjury of Greenglass which occurred during the trial.

The Court: I decline to take the testimony of Mr. Saypol on that.

Mr. Bloch: Now, I also make an offer to take the testimony of Mr. John Rogge and his associates, Mr. Fabricant and Mr. Gordon, as well as Ruth Greenglass, the wife of David Greenglass. She was the second Government wit-

ness. I would like to take that testimony to the effect that a deal was made between the United States Attorney's [fol. 327] office and the Greenglasses whereby in consideration of Greenglass's testimony, that is, Mr. and Mrs. Greenglass's testimony, Greenglass was to procure a lenient sentence, and Mrs. Greenglas was to go scotfree, and the subsequent events have confirmed this point. Greenglass did get a comparatively lenient sentence, and Ruth Greenglass was never indicted and is scotfree.

The Court: What was Greenglass' sentence?

Mr. Bloch: 15 years.

The Court: Have you anything more than a suspicion that such an arrangement existed?

Mr. Bloch: I have more than a suspicion.

The Court: Have you embodied the facts upon which your statement is based in an affidavit?

Mr. Bloch: Yes. I have reason to believe, your Honor, that the files of Mr. Rogge's office and the files of the United States District Attorney's office will reveal that deal.

The Court: Have you stated the grounds for that belief on your part in an affidavit?

Mr. Bloch: I have not stated that in my affidavit.

The Court: Have you stated the source of your information and the grounds of your belief?

[fol. 328] Mr. Bloch: I think in part I have.

The Court: Do you desire to amplify that?

Mr. Bloch: I may desire to amplify it, yes.

The Court: If you do, you may submit such amplification you desire in affidavit form by you not later than Friday at 12 o'clock.

Mr. Bloch: Your Honor, I still submit that considering Mr. Rogge was attorney for the Greenglasses and considering that I am also seeking to procure the files of the United States Attorney's office, and office which is adverse in this case, that it is illusory to believe that I will be able to procure affidavits from these sources on a voluntary basis.

The Court: The Court can't enter upon an exploratory inquiry here without some factual basis, particularly at this stage of the case where a defendant was convicted after a jury trial, where a considerable period of time intervened between his arrest and trial, and where since the conviction a considerable period of time has elapsed.

Mr. Bloch: It takes time, your Honor, to dig up the facts, and the facts have been recently revealed. It is my understanding that under the Mooney case this is proper.

The Court: This is a most serious allegation and should [fol. 329] not be made merely upon suspicion or conjecture, but it should only be made when it has as basis in fact. If it has a basis in fact, the factual basis should be disclosed to the Court in affidavit form. By your own statement you have not done that.

Mr. Bloch: I don't make any allegations lightly, and I think Mr. Lane and the entire United States Attorney's office will confirm that fact. I am very careful.

The Court: I am not at all impugning your ethical conduct here in any way, counselor. I simply point out to you that in a proceeding of this nature when you make charges of the type you are making and you make them upon information and belief, you are under the duty and obligation of disclosing the source of your information and the grounds for your belief, and you have the obligation of doing that in detail.

Mr. Bloch: Would you say that extends to confidential informants?

The Court: I say when it affects the judicial processes and when it affects the life of your clients, whom you have sworn to represent, there is no barrier, and even confidential informants should be disclosed and their identity should be [fol. 330] disclosed, because in a matter of this nature there is no such thing as a confidential informant.

Mr. Bloch: I am very glad to hear the Court say that. It relieves me. Will you bear with me one second?

The Court: Yes.

Mr. Bloch: Now, then, your Honor, I desire to offer the following proof from various scientists, all of whom reside outside of this country, and whose names are stated in the petition and whose affidavits are annexed to the petition, to the effect that David Greenglass was coached in connection with his fabrication for trial purposes of certain replicas of sketches of lens molds and a cross section sketch of the Atom Bomb which he allegedly, according to his testimony, transferred to the petitioner Julius Rosenberg, and, one Harry Gold, in 1945. If the Court will look at those

affidavits you will see that these renowned men of science, trained in the various scientific fields which touch upon atomic energy, aver that it was incredible or is incredible that David Greenglass, as he testified, five or six years after the event—remember, this trial took place in 1951 and these events were supposed to have taken place in 1945—was capable of drawing these various replicas which are intro- [fol. 331] duced in evidence and which were the guts of the Government's case, without the aid of any outside coaching or reference to scientific books and journals.

Greenglass testified that nobody, whether it be in the form of literature or persons, aided him in any way in drawing these sketches.

The Court: I have read these affidavits which you refer to. I assume you refer to Exhibits C, D, E, and F, which you annex to the order to show cause.

Mr. Bloch: That is correct.

The Court: I read them, and construing them in the light most favorable to the defendants, they contain expressions of opinion on the part of these individuals, these individual affiants, that the witness Greenglass testified falsely and untruthfully. That was an ultimate issue to be determined by the trial jury after listening to Greenglass's testimony both on direct and cross-examination and after considering the conduct and demeanor of the witness on the stand, whether or not his testimony was truthful and credible. I decline to take any testimony from these witnesses as to their opinion on that. The credibility of the witness was passed upon by the jury. You may submit any additional affidavits from them, if you desire, by Friday, at 12 o'clock [fol. 332] noon.

Mr. Bloch: Now I offer to bring before the Court testimony as indicated in point 3 of the petition, that the alleged subjects of transfer from Greenglass to the petitioner Julius Rosenberg and the petitioner Ethel Rosenberg were, in fact, public property, and not secret. I believe the Court will see in the third point the plethora of documentary material in the shape of scientific journals appearing in other parts of the world, including the Soviet Union, that show that all of the processes that went into the construction of the Atom Bomb that was developed at Los Alamos and elsewhere were

already known, not only in terms of theory, but in terms of reduction to practice by scientists all over the world, including the scientists of the Soviet Union and, therefore, that the classification of military that these processes were "secret" and "classified" was arbitrary and capricious, and that, in fact, no crime was committed under the Espionage Law.

The Court: The crime here is the crime of espionage as defined by statute.

Mr. Bloch: That is correct.

The Court: That simply makes unlawful an agreement or a conspiracy to transfer information.

[fol. 333] Mr. Bloch: Your Honor, the charge here was conspiracy to commit espionage. Now, the law with respect to the interpretation of that statute is as laid down in the case of United States v. Heine, in this Circuit. There was an opinion by Judge Learned Hand.

The Court: That is a case that was tried over in Brooklyn?

Mr. Bloch: No, that is a case that——

The Court: I think it was the Eastern District, an appeal from the Eastern District.

Mr. Bloch: That is right.

The Court: I am familiar with the case, counselor.

Mr. Bloch: Now, the theory of that case as I read it is that there can be no violation of the Espionage Law if the subject of transfer was public and not secret, and I submit to the Court that one can't conspire to commit a crime when what one does is, in fact, no crime.

The Court: Wasn't the reversal in the Heine case predicated upon the evidence which was presented on the trial and appeared in the trial record?

Mr. Bloch: It appeared in the trial record. That is true.

The Court: You had opportunity to incorporate similar [fol. 334] contentions and similar proof in the trial here.

Mr. Bloch: I submit in my reply affidavit the reasons why I——

The Court: I say, you had the opportunity.

Mr. Bloch: I want to expound on that. I did not have the opportunity. In fact, because I was a single practitioner and my clients were paupers, it was impossible to conduct

that kind of an investigation or to reach that type of expert testimony which is now revealed to the Court.

The Court: Did you make any application to the Court for permission to employ an expert?

Mr. Bloch: I don't think I had the right to do it under the statute.

The Court: Did you do that?

Mr. Bloch: I did not.

The Court: I decline to take any testimony on that phase.

Mr. Bloch: Will you bear with me for a few seconds?

The Court: Yes, take your time. I will give you a recess, if you want to. Suppose we take a five-minute recess.

(Short recess.)

[fol. 335] Mr. Bloch: If the Court please, I ask the Court to direct the United States Government to submit to the Court to be made part of the papers on this application all press releases issued by the Department of Justice, as well as press releases issued by any of the prosecuting officials of the United States Government with respect to the case of the petitioners prior to and during the trial.

The Court: Does the United States Attorney desire to be heard on that?

Mr. Kilsheimer: I desire to be heard on all the application that Mr. Bloch has made.

The Court: I will hear you in connection with this application after we are through with the statement of the witnesses that you desire to call. Are there any others?

Mr. Bloch: I then ask the Court either to permit me to subpoena the minutes of the grand jury that was sitting in the Southern District of New York investigating the general subject of espionage from August 1950 to and including March 15, 1951. I make that request, your Honor, in connection with the Pearl incident and in the light of certain allegations that I make in my petition to the effect that the Government according to their theory, had knowledge of [fol. 336] Pearl's alleged perjury long before the petitioners' trial commenced. It is a part of my allegation that the Pearl indictment was timed to take place during the trial of the petitioners. If the Court is not disposed to grant that request, in the alternative I request the Court on its

own motion to cause the minutes of that grand jury to be brought before it and made part of the papers on this application.

The Court: That application is denied.

Mr. Bloch: I have examined the state of the affidavits now with respect to the third subdivision of their second point with respect to the Schneider testimony, and I merely want to state to the Court now that on that issue I make no offer of proof because the Government has admitted that Schneider perjured himself at the trial when he stated that he did not see the petitioners from the time he allegedly took pictures in May or June 1950 to the day when he testified at the trial. So at the present time, your Honor, I think that these are the requests which I ask of the Court. Of course, your Honor, I think my petition also shows that this perjury of Schneider was necessarily known to the prosecuting officials in the light of Mr. Harrington's admission that he himself brought Schneider inside the railing to make an [fol. 337] identification of the defendants prior to the time he took the stand.

May I just ask a question, your Honor? I am just a little confused with this procedure, and I hope you will bear with me, because I think this procedure is novel with me. Do I understand that what has occurred up to now merely relates to the procedure which the Court is going to adopt in connection with the taking of testimony, oral testimony?

The Court: I don't anticipate that there will be the taking of oral testimony, unless there is need for it shown. At this stage I rule that there is no need shown by the defendants for the taking of oral testimony. I am giving you an opportunity until Friday noontime for the purpose of submitting additional affidavits, upon which I will then make my final ruling. But on the record as it now stands and on the affidavits as they now stand, I rule there is no need with reference to the defendants Rosenberg to take an oral testimony.

Mr. Bloch: I understood your Honor.

The Court: You make me nervous, Mr. Bloch, waving that pencil at me. I assume you don't mean to be offensive.

Mr. Bloch: I certainly don't.

The Court: I think it is a tactic that your father as an [fol. 338] old member of the bar would not approve of.

Mr. Bloch: I am sorry. I was not conscious, I can assure you. Do I understand your Honor that after these preliminary ruling or these rulings dealing with these preliminary matters that you are going to hear argument on the petition itself?

The Court: Yes.

Mr. Bloch: And the questions of law that are raised?

The Court: Yes, I am going to hear you probably this afternoon. Before we proceed with that, we better inquire of the defendant Sobell and his counsel. What testimony do you desire the Court to hear in connection with your petition?

Mr. Meyer: If your Honor please, I wish the record to show that I join severally in each of the requests made by Mr. Bloch on behalf of the defendants Rosenberg. I believe that it is more appropriate to point out in connection with the argument on the merits of our application the several points of distinction between the Sobell petition and the Rosenberg petition. As to those points of distinction on which I claim that Sobell is entitled to relief under Section 22——

[fol. 339] The Court: I will hear you on the argument later. I simply wanted from you now a statement as to what witnesses you desire the Court to hear? Who are they? What testimony you expect to elicit from them? I believe you have indicated to me that you have no other witnesses you desire to call, other than those who had been enumerated or mentioned by counsel for the defendants Rosenberg?

Mr. Meyer: That is correct, your Honor. On the question of Sobell's right to a hearing I don't have any others.

The Court: You have no other requests, other than that you join in the requests made on behalf of the defendants Rosenberg for the presentation of oral testimony.

Mr. Meyer: That is correct. May I address myself to the Court in respect to the matter addressed by Mr. Bloch?

The Court: Yes.

Mr. Meyer: I just wanted to raise one point for your Honor's consideration in connection with the various rul-

ings that were made, particularly with respect to the allegations of the petitioners as to just what was made and what was not stated to the press and the circumstances under which it was stated. We have a categorical denial [fol. 340] in the affidavit of Mr. Lane. It is found at the bottom of page 7 and the top of page 8:

> "Allegations that information was 'fed to' the press by the prosecution to inspire a press campaign against these defendants as well as allegations that 'all of the prosecution's evidence' was revealed to the press, are categorically denied."

This is just one of the several denials in the United States Attorney's papers.

Now, I simply would like respectfully to call your Honor's attention to the case of Walker v. Johnson at 312 U. S. 275, where, as I understand it, if the claims made in the petition on their face would entitle the petitioners to relief in a proceeding similar to this, it was held that the hearing cannot be denied on the mere denial of the United States Attorney.

The Court: Where there is a relevant issue of fact, relevant and material, the Court is required to take the testimony.

Mr. Meyer: That is correct.

The Court: But if there is an issue of fact either irrelevant or both irrelevant and immaterial, there is no need to take testimony. This application can be used as a means of attempting to affect a retrial of the issues which we determined at the original trial and which were resolved [fol. 341] adversely to the defendants by a verdict of the jury. We are not going to again try this case.

Now, so far I find it unnecessary to take any testimony. Particularly, I find it unnecessary to take the testimony of those individuals who have been mentioned or enumerated by counsel.

Mr. Kilsheimer, what have you to say to the application made by the defendants that there be produced and filed with the Court copies of all press releases issued by the United States Attorney concerning this prosecution?

Mr. Kilsheimer: As to that, your Honor, I say that first

of all we are opposed to the request of counsel. The Government has not denied the fact of the publication of the various newspaper articles which were annexed to the petition as exhibits or that those newspaper articles were published. We do not dispute that those newspaper articles purport to quote various Government officials. Therefore, I think that I can convince your Honor on the argument itself that taking those papers as published there is still no basis for relief. That would be irrespective of whether the information was given to the press by the prosecution or was dug up by the diligent efforts of the members of the [fol. 342] press themselves. It still remains that the articles were published and the Government officials were named in the articles.

The Court: The application at this time to require the United States Attorney to file with the Court copies of all press releases is denied.

Mr. Bloch: Before you fix your ruling, your Honor, I believe that Mr. Kilsheimer misapprehends the petitioners' position. On this first point about adverse pretrial newspaper publicity we are relying very greatly on the Delaney decision, which is cited in the petition. It is not only that there was a tremendous volume of pretrial newspaper publicity, but it is the fact that the prosecuting officials themselves stimulated that kind of inflammatory climate which made it impossible for these defendants to procure that kind of a fair and impartial trial guaranteed to them by the Constitution.

Now, I submit that Mr. Kilsheimer was not responsive to your Honor's question. I believe that these press releases in the possession of the United States Government should in all justice be submitted to your Honor so that you will have a basis for judging whether, in fact, the Government officials did feed this kind of information.

[fol. 343] The Court: Of course, the factual situation in the Delaney case is quite different from that presented here.

Mr. Bloch: I will argue that later. But the point is that I think Mr. Kilsheimer did not respond to the Court's request.

The Court: I think he has sufficient for me. It is sufficient for me to observe now that in the Delaney case it appears

that objection was made to proceeding with the trial at the time the trial was commenced, and there was a specific application made on behalf of the defendant for a continuance. The basis for that application was the alleged pretrial publicity which it was claimed had a prejudicial effect on the defendant and which created a condition so that the trial could not proceed free of an enveloping atmosphere and public preconception of the guilt, to use the language of the Court. Such an application was not made in this case. No application was made, so far as I have been able to see, from my examination of the trial record so far, for a continuance. That presents quite a different situation than was present in the Delaney case.

Mr. Bloch: I assume we will argue that point, your Honor, in connection with the main argument on the peti-
[fol. 344] tion.

The Court: Yes. I am going to hear you on that. How long do you expect to take, counselor, in your argument? I will hear you first, Mr. Bloch. Then I will hear you, Mr. Meyer, for Sobell, and then I will hear you, Mr. Kilsheimer. Are you going to argue for the Government, Mr. Kilsheimer?

Mr. Kilsheimer: Yes.

The Court: Then after I have heard the three of you I will give you each an opportunity to make a brief reply. I simply want to point out this, Mr. Bloch, and I point this out to all counsel, including you, Mr. Kilsheimer: There are statements that I have read in these affidavits which don't belong there. They are not statements that become legal draftsmanship. Now I expect during the argument you will confine yourselves to a discussion of the legal principles involved, and not go off on any rhetorical outbursts concerning matters which the Court is not concerned with. With that admonition to all of you I am prepared now to hear your argument on the legal problems involved by these motions.

How long do you expect to take, Mr. Bloch?

Mr. Bloch: I will let your Honor fix my time. I will try to be concise.

[fol. 345] The Court: I don't want to limit anybody.

Mr. Bloch: I know you don't.

The Court: I am not going to do that. What I had in

mind was this: I thought that we could recess for lunch now and come back at half-past one. I would hear you then. I should think that perhaps an hour ought to be enough for you, Mr. Bloch. If you need longer, you may have it.

Mr. Meyer: I would request about 40 minutes.

The Court: That will be all right, and I will give Mr. Kilsheimer about an hour, and I will hear rebuttal for a reasonable time. I want to impress upon you all that when I set this time I set it not as a limitation upon any one of you. As long as you adhere to the presentation of the legal arguments I am not going to curtail you in the time taken, because I am not concerned with saving time; I am concerned with the accomplishment of justice, as the law provides for it and as I see it according to the dictates of my conscience. So we will have an adjournment now until half-past one and we will come back and hear Mr. Bloch, Mr. Meyer, and Mr. Kilsheimer, and if we can conclude the argument today, we will do it. If not, we will put it over until tomorrow.

All right, we will adjourn until half-past one.

(Recess to 1:30 p. m.)

[fol 346] AFTERNOON SESSION

The Court: All right, Mr. Bloch, you may proceed. Take your time.

Mr. Bloch: May it please the Court, this application is brought by the petitioners Julius and Ethel Rosenberg under Section 2255, Title 28, of the United States Code, to vacate and set aside the sentences of death that were imposed upon them following their conviction in March 1951, for conspiracy to violate the Espionage laws. These petitioners appealed that conviction of sentence to the United States Court of Appeals for the Second Circuit, and on February 25, 1952, that Court, writing through Judge Frank, affirmed the convictions.

Thereafter, the petitioners duly petitioned the United States Court of Appeals for a rehearing, and in April 1952 that petition was denied by the Court with an opinion by Judge Frank writing for the Court.

Thereafter, the petitioners duly petitioned the United States Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals, and in October 1952 that petition was denied by the Court.

Thereafter, the petitioners duly petitioned the United [fol. 347] States Supreme Court for a rehearing on that denial of the petition for certiorari, and on November 17, 1952 the United States Supreme Court denied the petition for a rehearing. An opinion was rendered by Judge Frankfurter in connection with that latter denial, and as I read it, it merely expressed his own views.

Both on the petition for a writ of certiorari and on the petition for rehearing Judge Black dissented from the majority of the court and voted to review the record by granting the petition for certiorari. Immediately thereafter the petitioners brought on this application.

I might state to the Court in the light of some of the statements that you made this morning you felt that I should have exhausted all of my remedies on appeal before I instituted on behalf of the petitioners this proceeding. I was confident or certainly had reasonable expectation that the points of law which I advanced to the respective appellate courts were substantial and had merit and that the appellate courts would reverse the convictions and the sentences that were imposed on those convictions.

The Court: While we are getting the chronological sequence of events, may I ask when Julius Rosenberg was [fol. 348] arrested and taken into custody?

Mr. Bloch: He was arrested on July 17, 1950. Ethel Rosenberg, the other petitioner, was arrested on August 11, 1950.

The Court: What was the date of the indictment? Was there a superseding indictment?

Mr. Bloch: There was a superseding indictment.

The Court: What was the date of the first indictment?

Mr. Bloch: August 17, 1950.

The Court: In that indictment both Julius and Ethel Rosenberg were named?

Mr. Bloch: That is correct.

The Court: Was there a superseding indictment?

Mr. Bloch: That is correct.

The Court: When was that?

Mr. Bloch: I think it was sometime in October 1950.

The Court: Could we get the exact dates, just so that I will have the exact dates before me?

Mr. Bloch: The first superseding indictment was filed October 10, 1950.

The Court: And the defendants pleaded to that indictment on what date? Do you know? To the superseding indictment?

[fol. 349] Mr. Bloch: The record does not indicate the date, but I think it was within a week thereafter.

The Court: Trial was begun on what date?

Mr. Bloch: The trial was begun on March 6, 1951.

The Court: The verdict of the jury was given on what date?

Mr. Bloch: On March 29, 1951, and sentences were imposed on April 5, 1951.

The Court: So that I may have my record complete, what was the situation with respect to the defendant Sobell?

Mr. Bloch: Before you come to the defendant Sobell, I don't know whether the Court has the date of the last superseding indictment upon which the defendants were tried and convicted.

The Court: I understood it to be October.

Mr. Bloch: No. There was a second one, which is the current indictment, and that was returned in January 1951. January 31.

The Court: January 31?

Mr. Bloch: That is correct.

The Court: Do both the original and the two superseding indictments against the Rosenbergs charge the same crime [fol. 350] substantially?

Mr. Bloch: That is correct.

The Court: Except the verbiage was changed?

Mr. Bloch: There were some parties added.

The Court: As conspirators?

Mr. Bloch: That is correct.

The Court: Now, as to Morton Sobell. I will try not to interrupt you, but just so that I get these dates.

Mr. Meyer: Sobell was arrested on or about August 18, 1950. The indictment which Mr. Bloch has referred to or

August 17, 1950 did not name him, although there was a warrant out for his arrest for some two weeks before. He was not indicted until his name was added in the first superseding indictment.

The Court: That is October 10?

Mr. Meyer: Yes.

The Court: So he remained in custody from August 18 to October 10?

Mr. Meyer: He remained in custody continuously.

The Court: Was he named in the superseding indictment?

Mr. Meyer: He was, sir.

The Court: That is, the one of January 31?

[fol. 351] Mr. Meyer: That is right.

The Court: And he was sentenced the same day?

Mr. Meyer: That is correct.

The Court: Now, are these three defendants, were they tried on a joint indictment?

Mr. Meyer: A single indictment with a single count.

The Court: Was there a consolidation of the indictments for purposes of trial?

Mr. Meyer: Not for purposes of trial, just by superseding indictments.

The Court: All right.

Mr. Bloch: Now, your Honor, if the Court deems it relevant, there were certain additional overt acts charged in the superseding indictment, but the nature of the charge, namely, conspiracy to commit espionage, remain the same in all of the indictments. So that, your Honor, we get to this present application which has three main grounds which the petitioners urge as sufficient in law to warrant relief. The first ground deals with pretrial publicity by the metropolitan press and by the other media of communication circulating in or about the metropolitan area, of such adverse character that the defendants were prejudged by the public because the public had become pre-[fol. 352] conditioned in their thinking by virtue of this publicity into the belief that the petitioners were guilty of the crime charged.

Now, co-joined with that is the ground that this newspaper publicity was initiated, furthered, stimulated and generated by the prosecuting officials of the United States

Government, so that there was direct participation by the officials of the United States Government in creating a virulent and hostile climate which made it impossible for these petitioners to secure a fair and impartial verdict by a fair and impartial jury.

Also, in this first point of newspaper publicity, aided, abetted and stimulated by the officials of the United States Government, is an incident which for convenience may be termed the Pearl incident, in which one William Pearl was indicated at the behest of the United States prosecuting officials in the middle of the trial of the petitioners, and the newspaper publicity consequent upon an unsealing of that indictment, as well as statements made by Mr. Saypol, the United States Attorney for this District who is the chief prosecutor of these petitioners, further inflamed the public climate and even independently caused such an inflamma-
[fol. 353] tion of the public climate as to damage and prejudice these petitioners in the eyes of the public and in the eyes of the jury.

Now I would like to take these points up seriatim.

The Court: When you do so, perhaps you might bear in mind the thoughts that the Court has on the law applicable to such a situation. I am interrupting you for the purpose of giving you my thoughts at this moment, and the thoughts are not the result of any extensive research; nor do they represent the final thoughts the Court may entertain on the subject.

Mr. Bloch: I intended to address my remarks with that orientation.

The Court: I have not given you what my present thoughts are, and perhaps if you are arguing, you might wish to point out certain features of this case that bear upon my general view of the situation.

I understand that an application of this type under Section 2255 was designed as a means whereby there should be consolidated and considered at one time others which formerly were restricted to hearing and consideration on writs of habeas corpus, that is jurisdictional defects, as well as matters which might be urged on an application for a new
[fol. 354] trial, either on the ground of newly discovered evidence or on such grounds as might appeal to the conscience of the Court.

Now, these points that you raise, one, that the trial was had at a time when the public mind had been inflamed as a result of prejudical pretrial publication; two, the defendants' rights were prejudiced to a fair trial by reason of publications which occurred in the middle of the trial or while the trial was being conducted; and, three, that there were prejudicial acts on the part of the prosecuting authorities, first by engendering and promoting or encouraging this prejudicial publicity and, secondly, by proceeding with an indictment for the purpose of prejudicing the public mind against the defendants—all of these points are points which might properly have ben raised either at the trial, at the time of the trial, or prior to trial in connection with an application for a continuance, or if no application was made, then by calling the matter to the Court's attention during the course of the trial so that the Court might then take such action as it deemed necessary either by declaration of a mistrial or by other disciplinary action in that the Court might deem advisable, or the defendants should have [fol. 355] raised it immediately after verdict and prior to appeal, or prior to the time of the imposition of sentence, and that not having done that, they may not at this time urge these matters. As I see it, a defendant may not when he feels he is not receiving a fair trial remain silent and await the outcome of that trial in the hope that it will be satisfactory to him, that its outcome will be satisfactory to him, and then after an adverse verdict for the first time raise these things which might have been raised in advance of the trial or prior to verdict, and, in any event, a defendant may not remain silent if he believes these conditions to have existed and not raise them prior to appeal.

Judging the situation by the sequence of events, a defendant may not a year and a half later urge now as the basis for a retrial matters and grounds of which he was fully cognizant and of which he was fully advised during all the intervening time and during the intervening appeals.

Now, if you just bear those thoughts in mind as you talk, I will try not to interrupt you.

Mr. Bloch: I assume, if I may put your thoughts in capsule form, they *d*ome down to raising the question of estoppel or waiver.

[fol. 356] The Court: There is no such thing as estoppel

or waiver in criminal law, at least, so far as a defendant is concerned.

Mr. Bloch: I will meet those reservations as I go on.

The Court: Nor can it be said to be a waiver on the part of a defendant of those matters which we as Americans cherish and hold dear, our fundamental ideas of fair play and due process.

Mr. Bloch: I think in these latter remarks the Court has put its finger on my contention.

The Court: At the same time, a defendant may not trifle with the judicial process.

Mr. Bloch: I agree with both of those remarks and I want to address myself now to the first one. It is our contention that this trial was so steeped in prejudice that it offended the rudimentary concepts of American jurisprudence, and that it would be startling to permit two persons to go to their death were the Court to come to the conclusion that the atmosphere in which these defendants were tried were as hostile and virulent as I set forth in my moving papers. I say that it would shock the conscience of any American judge to allow this catastrophe to happen, and also, I say to the Court, there are precedents which would indicate [fol. 357] that this is not the kind of a right which is as easily waived as, for instance, when a defendant waives his right to assert his privilege against self-incrimination. This issue transcends the fate of these two petitioners; it goes to the administration of criminal justice.

The fact remains that serious students of law have been concerned more and more in the last few years with what is commonly called "trial by newspaper." There have been law review articles and there have been commentaries by learned jurists both within and without court opinions concerning this subject.

Now, on the question of why this was not raised prior to or during the trial, I think the Court ought to be informed of the true facts. At the outset, may I say that I understand waiver to be an intentional relinquishment of a known right, and that presupposes that one must have an intent to relinquish and one must know that one has a right. Neither of those conditions were present in this case.

You must understand, your Honor, that these petitioners were paupers, and the files of this court will show that on

their behalf I submitted an application to the trial judge to get daily copy of the trial testimony without cost to these [fol. 358] petitioners, and there was appended to that application not only the petition of the petitioners, but my affidavit as their counsel, in which I fully and frankly set forth the total amount of moneys that I had received from the petitioners and the net amount of my fee, which was, if your Honor please, infinitesimal as compared with the amount of work and the responsibility which I had to bear in a capital case. This is a matter of public record. From the time of the arrest of these petitioners I was virtually alone. I am a single practitioner. It was impossible for me to have become aware or be aware of the overpowering, the almost unprecedented volume of publicity dealing with the issues that impinged upon the petitioners' case. One can only comprehend damage sustained by these petitioners if one makes the most thorough investigation and research of the press publicity that there was attendant upon this case and the related cases that preceded it to get a grasp of the poison that pervaded the atmosphere of the City of New York against these petitioners.

Now, I read newspapers like every literate person. But I say to the Court now and I repeat to the Court now, as I did in my reply affidavit, that from the time I became in- [fol. 359] volved as counsel for these petitioners I was so immersed in taking care of their rights in terms of appearance in court, making certain motions for them, investigating the merits of the allegations of the indictment, that I did not read newspapers for days. I just did not have the time to do it. And I might say here parenthetically that there has been sprung up in this case reference to me as "astute counsel." Well, it is quite apparent I was not so astute, because if I were that astute I would have the tremendous imagination of throwing my mind backward 14 months and establishing an unbroken chain of publicity, starting with Dr. Fuchs' arrest in 1950, and coming right down to the petitioners' trial, so that I could comprehend just what kind of an atmosphere was prevalent in New York City.

We came into court, your Honor. The judge acted like a dignified American judge; all defense counsel acted like dignified American lawyers; the prosecution staff acted

like dignified prosecutors. The jury was in the box, and we went through all the formalities. Everybody was polite and everybody tried to preserve the respective rights of all parties. But, your Honor, I saw to you that we were going through a sham and we were going through a fraud, that with the best of intentions, none of us controlled or could control that old pervading and terrible atmosphere that [fol. 360] permeated the climate of this city with respect to these defendants.

I am not going to bore the Court now on this legal argument with all the facts that I have presented in my petition which will indicate to you that these defendants followed a succession of arrests, confessions and convictions of a number of persons, starting with Dr. Fuchs, followed by Gold, followed by Slack, followed by Drothman and Moscowitz, and as each was indicted or arrested, he was connected with the preceding defendant; so that by the time my clients were arrested they were the fifth or sixth in a line of "Atom Bomb spies" and part of the "Fuchs-Gold conspiracy." And I say that the jury probably with the best of intentions and trying to be honest within matters of their own judgment or their own conviction, I say that the trial was merely a confirmation, certainly the verdict of the jury was merely a confirmation of what had preceded prior to the trial. I say that this was especially reprehensible because if you will read in my petition, starting with page 44 and going on, it was the officials of the United States Government who tried their case in the newspaper and convicted these defendants before they even walked into a [fol. 361] courtroom.

Let me read to the Court, if I may, the statement that was issued by the head of the FBI, J. Edgar Hoover, who is a very respected official of the United States Government and whose words carry great weight with the public.

The Court: I have read that.

Mr. Bloch: Well, then, I don't have to repeat, your Honor. And when the United States prosecuting attorney follows up that statement and not only reveals the evidence that he is going to introduce in court, but characterizes the defendants in the most damnable language, then I say to the Court not only have we a breach of the canons of ethics which prohibit an attorney from trying his case and publicly

proclaiming his version of a litigation while he is repr-senting one of the litigants, but a pollution of the administration of criminal justice, and I say that is precisely what happened here.

I say under these circumstances, your Honor, it would be shocking, and I say it would be violent of every elementary piece of constitutional law to say that these defendants, these petitioners under these circumstances are now estopped. I use the word "estopped" loosely, of course, [fol. 362] your Honor, but we should not be precluded from raising this point on this application.

As a matter of fact, Section 2255 was designed to give relief precisely in those cases where the Court feels that an injustice, a gross miscarriage of justice would ensue were not the sentence set aside and the conviction overturned.

Now, these defendants were incarcerated during this period. They were each held on a hundred thousand dollars bail. They did not have available to them the techniques that only became available to me a few months ago when a group of interested persons gave me disbursements to make investigation, as a consequence of which I was able to unearth this tremendous amount of material which I have submitted to the Court, and, indeed, I had to hire three trained persons in the newspaper field who gave me three weeks' time to go through all of these newspapers and collate the information that would enable me to pass judgment as to whether or not there was sufficient pretrial publicity to warrant making application.

Now, I say to the Court that there are some lawyers who come in and make all kinds of applications, some of them frivolous. I happen to be not that kind of a practitioner. [fol. 363] I am very serious when I urge something before the Court, and I did not make this application before because I did not have the facts upon which to base a legal opinion and conclusion, which I now urge before you, to demonstrate that this entire trial was a form, and it was devoid of the content of that fairness which is incidental to the administration of justice in this country.

The Court: Let me ask you a personal matter. You impress me, counselor, as being very competent and able and sincere. How long have you been a member of the bar?

Mr. Bloch: 28 years.

The Court: During that time have you had previous experience defending those charged with the commission of crime?

Mr. Bloch: I have.

The Court: Have you previously defended those charged with the commission of homicide?

Mr. Bloch: I have not, except in one instance out of town, where I was hired on appeal.

The Court: To handle the appeal?

Mr. Bloch: That is correct.

The Court: But you have had experience in the defense of those charged with crime?

Mr. Bloch: I have.

[fol. 364] The Court: During your entire period as a member of the bar?

Mr. Bloch: Continuously, with the exception of some Government service which was in the nature of legal duties. Now, your Honor, may I also say this: before I launched into this rather vehement denunciation of what I consider to be a gross miscarriage of justice in this case, I was stating to the Court that this question of pretrial newspaper publicity has given concern to many jurists and legal thinkers; and those who have thought about proper administration of our laws, and it is quite significant that it is only very recently in the Delaney case that we began to get a crystallization and a clarification in this branch of the law, and new paths, new visions have been opened up to us by Judge Magruder's opinion.

The Court: Of course, I did not read the Delaney opinion in that light. I read it simply as an application of principles which we have always recognized as existing in our system of jurisprudence.

Mr. Bloch: I think, your Honor, when Mr. Kilsheimer gets up and cites you certain opinions in this Circuit, it is not as easy as it appears.

The Court: It seems to me that the Delaney case is a [fol. 365] current application of the American concept of fair play which we always try to protect and enforce in our courts.

Mr. Bloch: Perhaps you interpret the Delaney decision that way. I am not saying that you are wrong at all. I think that Judge Magruder attempts to light for the bar

certain concepts which have never been as clearly expressed before by any court, at least, not by any decision that I have read about, and I have read some decisions since I have struggled with this particular concept which forms the basis for my point one.

Now, I say that all of the conditions are present here for the application of the Delaney doctrine. I say that what happened here was much worse in terms of prejudice to petitioners than what happened in the Delaney case. In the Delaney case you had a legislative inquiry. You had a legislative committee come into the City of Boston and conduct an investigation as to the matters upon which Delaney thereafter was tried and convicted. Here you have the Government itself through the very prosecuting officials predetermine the guilt of the petitioner and represent to the public that they were guilty of the crime charged. I say that it is [fol. 366] high time for some court to state quite unequivocally that this must not be, that this type of practice of trying your case in the newspapers by officials responsible for the administration of criminal law must not be, that this must stop. Defendants are entitled to their presumption of innocence. That is a cardinal principle of our law, and I say that when you permit prosecuting officials to do the things that they did in this case, you emasculate, if not completely destroy, that presumption of innocence. I say that is why in this case it is equitable, it is right, it is valid to set aside these sentences, and I think this should appeal to the conscience of the Court to so determine.

Now, your Honor has read my petition. I am not going to go through any of the documentation. I am confident that the conclusory statements that I have made from the facts in my petition are stated upon the basis that I have properly represented the facts in my petition. Then I would like to come to the incident which occurred during the trial, this William Perl incident.

The defendants, as your Honor has heard, were charged with conspiring to commit espionage. The first, the main witness against the defendants was a man named David [fol. 367] Greenglass. He had testified for two days. He was followed on the stand by his wife, Ruth Greenglass, who was the second witness in importance for the prosecution, and as Judge Frank stated in his opinion in the Circuit

Court, were if not for the Greenglass testimony there never could have been a valid conviction against the petitioners.

Now, the Greenglasses were what we term in law, accomplices. David Greenglass was a co-defendant. He had pleaded guilty and was awaiting sentence at the time of the trial. Ruth Greenglass through her testimony had admitted that she was an espionage courier working for and with her husband. So that this case, your Honor, as the Supreme Court has termed it, based as it was on accomplice testimony, is weak, and all the statements of the United States Attorney before any court cannot overcome this weakness of the prosecution's case.

Now, the Government itself recognized the weakness of its case, because when Perl was indicted, Mr. Saypol stated to the press that the purpose of Perl's—and he was listed as one of the Government witnesses—testimony was to corroborate Greenglass with respect to some illicit trans- [fol. 368] actions of the petitioner Julius Rosenberg. Now, Perl was indicted on four counts. It is important to see what those counts were. He was indicted because they claimed that in September and October of 1950, and that was approximately six months prior to the time he was indicted, he perjured himself before the grand jury at his respective appearances because, first, he denied that he knew the co-defendant Sobell, second he lied because he denied that he knew the defendant Julius Rosenberg, third, he lied because he denied that he knew a couple named Sidorovich, and four, he lied that he knew a couple named Ellicher. Ellicher was a Government witness. The Sidorovichs were mentioned as espionage couriers by Greenglass's testimony. Sobell, according to the Government theory, was working in a conspiratorial way to commit espionage with the petitioner Julius Rosenberg. Were Perl to have stated that he knew Rosenberg in the setting and the context as contended by the Government through the testimony of David Greenglass, the Government would have gotten the corroboration that it desired to get, as Mr. Saypol so openly disclosed to the Press.

Now, if this were all there was to it, perhaps we would have forgotten about it. But when Perl's indictment was unsealed and broke in the newspapers, there were banner [fol. 369] headlines. On the morning of March 15, 1951,

you got the story that Perl was indicted because he was part of an Atom Bomb ring with the petitioners and the co-defendant Sobell, and you got in the press Saypol's statement that he would have corroborated the Greenglasses. So we, defense counsel, were concerned, and we asked the Court whether we could come up to the bench. You will notice in the proceedings of March 15, in the record of the trial which is made an exhibit and which you have in your possession, that there was an off-the-record colloquy. The reason for that was simple. The judge did not know what we wanted to talk to him about, and I started the conversation and I told the Court that we were concerned. Mr. Saypol, quite irritated, stated in a preemptory way: This indictment was returned in the regular course of criminal practice. I don't like any innuendoes, and so forth. And Judge Kaufman said to us, "You have the word of the United States Attorney."

I say to the Court that I, for one, as well as all defense counsel, relied upon that word, and it was only in the light of subsequent events that I had reason to believe that Mr. Saypol was not passing a word as we gentlemen know the word to be and to signify, because to this very [fol. 370] day Perl has not been brought to trial, and the files of the Perl indictment—his indictment was returned right here in the Southern District—will disclose enough facts from which your Honor can deduce that the Perl indictment was filed. I say these are deductions, these are reasonable deductions, and I assure your Honor that it is with great restraint and with a certain amount of hurt that I open court have to make a statement like this, about the prosecuting officials of the United States Government. But as a reasonable person drawing reasonable conclusions from certain facts, I must state that to you and urge it upon you as a ground which should vitiate this conviction.

I am not going to go into all of the facts. Perhaps Mr. Meyer in his argument may care to elaborate on some of the facts from which you can draw your own conclusions as to the bona fide of the Government in causing Perl to be indicted and his indictment unsealed in the middle of the petitioners' trial and at the very time when Greenglass had already completed his testimony, when his wife was

almost through with cross-examination. So I think that we, defense counsel, acted like any reasonable attorneys would have acted under the circumstances. We take words; [fol. 371] we take the representations of fellow counsel. And, certainly, we take the representations of public officials, and we don't seek to question them. I say we were misled, and I say that the subsequent events demonstrate that. The record in our case will show that despite the Government's contention that they did not know of Perl's perjury until March 6, which was about a week before the indictment was returned, they knew or should have known, if the prosecution's theory is correct, that Perl had perjured himself months before, because one of the witnesses for the prosecution, indeed, the first witness testified to matters relating to Perl and any connection that Perl had with the petitioner Rosenberg.

Now, your Honor, I would just like to conclude on this first point by making this statement: All of these factors which operated to create a climate cannot be separated mechanically. It cannot be said, for instance, that the publicity which surrounded the petitioners' case alone was not of sufficient magnitude or gravity to move a court to grant relief. There were present in the petitioners' case all the volatile issues which deeply move and arouse the American public and have been for years, shall I say, deep-[fol. 372] seated fears. You have had the Atom Bomb, the most destructive weapon ever known to mankind. And for two months prior to the petitioners' trial the newspapers played up the horrors of the Atom Bomb and described to the public how with one blast a hundred thousand to a hundred and sixty thousand people would be annihilated in the metropolitan centers and that if the bomb were dropped in the metropolitan centers, like New York City, there was no defense to bombing of that kind, that these bombs could be smuggled into our ports by steamers and so forth. You may very well recall those stories. They were hair-raising; they were lurid; they were gruesome; they were enough to strike terror in the heart of every human being who thinks of himself and his family and his children.

The Court: Do you maintain that this publicity was a matter of common knowledge?

Mr. Bloch: I say that the dangers, the horrible consequences of atomic bombing was a matter of common knowl edge. But what I was going to say to the Court——

The Court: The publicity itself?

Mr. Bloch: The publicity itself was a matter of common knowledge.

The Court: If it were a matter of public knowledge, that [fol. 373] common knowledge was shared in by you and by the defendants.

Mr. Bloch: With this exception, your Honor——

The Court: And should have been urged as a basis for a continuance.

Mr. Bloch: I don't think that that fact standing alone would have warranted an application for a continuance, and what I was going to say to the Court is that this subject was interlined and interwoven with other subjects, like communism, communist spies, Atom Bomb spies, and if you will read those exhibits and see how for fourteen months the press built this up and how the prosecuting officials built this up, to merge all of these four lines of propaganda, you then get the impact, that devastating impact which, I say, created an intolerable climate that made it impossible for the defendants to secure a fair trial.

Now, I say to the Court that even though we may not have a case exactly like that of Moore v. Dempsey, where there was a lynch mob and where in a 2255 proceeding the Supreme Court set aside the verdict, you do have as close as you possibly could a situation of a lynch mob atmosphere without the rope.

The Court: How soon after the arrest was the trial had in the Moore-Dempsey acse?

[fol. 374] Mr. Bloch: The trial in the Dempsey case, I think, was had within a few weeks after the arrest. I don't know the exact case.

The Court: I think it was even shorter than a few weeks. Now here you have an arrest of the Rosenbergs, of Julius in July and in August for Ethel Rosenberg, and you don't have a trial until March 6, which is seven or eight months later, almost. There was no undue or no unseemly haste of rushing these defendants to trial. You say that they were put on trial amid an hostile atmosphere, and yet the records, so far as I saw, reveal that objection was never raised

and no application was made for a continuance of the trial. It seems to me that from that the Court might well infer that the defendants and their attorneys felt that notwithstanding this publicity, there was not such an atmosphere as would deprive the defendants of a fair trial by a fair and impartial jury.

Mr. Bloch: All that I can say in answer to that is that you have to know, you have to comprehend all of the material which I collated in order to form a judgment as to whether or not there was that kind of a virulent atmosphere to warrant application for a change of venue.

The Court: The defendants were not strangers to this [fol. 375] community. Weren't they New York residents?

Mr. Bloch: They were.

The Court: You are not a stranger to our community.

Mr. Bloch: I am a born and bred New Yorker.

The Court: You were a part of this community that you claim had been inflamed against the defendants, and yet you made no protest at the commencement of the trial and you asked for no continuance. Now, from that the Court may well draw the inference that you concluded that a fair trial could be had. No court could hold that due process can ever — waived by a defendant charged with crime. I would never make such a holding. But the Court might be justified in this case, and I think will be justified from my review of the situation, in saying that from your failure to protest, an inference might well be drawn that you yourself felt that a fair trial could be had, and so did the defendants.

Mr. Bloch: I have two things to answer to that: The first is my sworn statement which I have submitted to the Court, and the second is that even if all of these facts were known to me and other defense counsel and the defendants, a verdict of a jury under such circumstances is so tainted that it [fol. 376] would be repellent to elementary concepts of American justice, especially where lives are at stake and especially, incidentally, your Honor, where there are serious and sharply controverted questions of fact, and where the defendants have always maintained their innocence, and in the light of the weakness of the prosecution's case. I just urge that upon the Court with the utmost sincerity.

The Court: I realize that you do.

Mr. Bloch: And I tell you this, your Honor, that I would feel horrible if I felt that I was so derelict in my duty as to not raise a point where a life might be forfeited.

The Court: You have not been derelict in your duty. In fact, the Court of Appeals after examination of the trial record has described you as a highly competent and experienced lawyer. I have found no evidence to the contrary.

Mr. Bloch: Well, you know, we are all fallible.

The Court: Even Professor Einstein told me that last week.

Mr. Bloch: Now, I would like——

The Court: Do you want a recess now for five minutes? I will give it to you. Any time that you want a recess, just [fol. 377] speak up.

Mr. Bloch: I would appreciate a short recess.

(Short recess.)

The Court: You may proceed, Mr. Bloch.

Mr. Bloch: Now, your Honor, I would like to come to the second point which these petitioners advance in their petition for relief. In substance, we contend that we hope we have demonstrated to the Court that the case against the petitioners was built on perjured testimony, and that, therefore, the trial was steeped in fraud and, therefore, there was a violation of due process. I think the law has been pretty well charted in this field, starting with the Mooney doctrine, which has never been repudiated. This is the type of matter which cannot be disputed as being capable of being raised subsequent to the trial, especially when the evidence of the perjured testimony and its knowledge by the Government came to the attention of the convicted after the trial. This point breaks itself down into three incidents, each of which may be taken singly, but which should also be taken in interrelated fashion, because from these three incidents one can only conclude fairly that the Government's case was presented falsely to the jury, known [fol. 378] to be presented falsely, and, therefore, any determination that the jury arrived at was based upon false and fraudulent statements and representations and testimony.

The first incident deals with the alleged David Greenglass confession at the time of his apprehension. The sec-

ond incident deals with the coaching of Greenglass in making certain exhibits which were introduced as exhibits in the trial. The third deals with William Schneider. I would like to go into the last one first, because I don't think there is any factual dispute about that paragraph. Schneider was the last witness that the Government produced. They produced him in rebuttal. The only way I can characterize his appearance and testimony is to say that it was a Hollywood climax to the trial. He was not listed on the Government's list of witnesses, which, according to statute, the Government was compelled to produce to the defendants at least three days prior to the commencement of the trial.

The Court: What statute is that? In an espionage case?

Mr. Bloch: It refers to any case involving capital punishment.

[fol. 379] The Court: I recall it now.

Mr. Bloch: Now, when this witness took the stand, of course, I objected upon the ground that he had not been listed, and the Government claimed that they came within the exception of the Golby case, a Supreme Court case, that it was a witness who afterwards came to the knowledge of the Government. That question of law was litigated and adversely decided to the petitioners. But there was an aura of suspicion, nevertheless, about Schneider, and he gave very damaging testimony. Greenglass, the main Government witness, has testified that petitioners had persuaded him or tried to persuade him to flee the country to escape arrest, and that the petitioner Julius Rosenberg told Greenglass that he himself and his family were making preparation to flee the country.

Now, this question of flight is an extremely sensitive one, especially to a jury, because certain obvious inferences are raised when a man runs away under certain circumstances.

Under direct questioning by Mr. Saypol, this witness was asked whether or not he had seen the petitioners from the time he allegedly took passport photos of them and their children in May or June 1950, to the time he took the witness [fol. 380] chair, and his answer was a categorical No. It now develops, and it is uncontroverted, that the day before Schneider testified he was brought into court by Mr. Harrington, an FBI agent, who happens to be sitting in this

courtroom now, and who was present at the prosecution counsel table throughout the trial of the petitioners, brought inside the front rail of the courtroom, and requested to identify the defendants.

Now, long before we came here, your Honor, on this application, I am sure that your Honor being an average newspaper reader has heard about this. It was quite a celebrated thing and it received, as you already know, a tremendous amount of publicity. Now, this type of identification was not only in violation of the trial court's injunction that all witnesses were to be excluded from the courtroom, but permitting a witness to make an identification in that fashion has in other branches of criminal law been condemned as unfair. Let me put it this way——

The Court: Let me ask you one question on that. As I recall, the defendants Rosenberg took the stand.

Mr. Bloch: They did.

The Court: This man Schneider, am I correct in my [fol. 381] recollection, was a Bowery photographer?

Mr. Bloch: 99 Park Row.

The Court: Now, during the testimony of the Rosenbergs on direct were they interrogated as to whether or not they had in fact gone to this place, this place of Schneider's?

Mr. Bloch: That is correct. I interrogated them, and the reason I interrogated them is that the day before Mr. Saypol had cross-examined them on this fact.

The Court: Did they deny they had gone there?

Mr. Bloch: It is true they did not deny categorically that they ever went to the place for the purpose of taking passport photos; they said they did not recollect whether they went to this place or other photograph shops to take photos that are ordinarily taken by family groups.

The Court: Did they categorically deny going to Schneider's shop?

Mr. Bloch: They did not deny going to Schneider's shop. They categorically denied that they went to his shop for the purpose of taking passport photos. They said they don't recollect whether they were in this shop or another shop, that it was their custom to take photos of their children and themselves, and I might say to the Court that 99 [fol. 382] Park Row was within six or seven blocks of the

home of the petitioners. They lived down here in a development known as Knickerbocker Village. It is just about six blocks east of Chambers Street and Park Row. Now, many a man is in jail and many a man is out of jail because some prosecution witness either identified him or failed to identify him as having committed a particular criminal act.

I say in conjunction with the setting of the Schneider testimony, this type of identification, this obvious perjury on the part of Schneider, may have and probably did mislead the jury. I don't know whether we can conjecture whether the jury may or may not have believed Schneider had they known that he was smuggled into the courtroom the afternoon before in order to make an identification. As a matter of fact, one of the cardinal issues about his testimony was whether or not he actually could identify these defendants as having come to his place in May or June 1950, to take photos. So we start off, your Honor, at least with one important Government witness giving perjured testimony, having perjured himself with the connivance of prosecuting attorneys, and I say that it is the duty of a prosecuting official when a witness states an obvious lie [fol. 383] on the stand and he knows it is a lie, to make some statement to the Court so that the true facts can come out before the Court and the jury. I say in this case the Court was misled and the jury was misled and the defendants were misled. The prosecution, however, was not misled, but lent themselves to this type of testimony.

I would like to come to the first two incidents, that is, in connection with David Greenglass. As I stated before, David Greenglass was the main prosecution witness. The Court questioned David Greenglass in connection with certain matters that I was treading upon on my cross-examination, namely, whether Greenglass at the time he was apprehended cooperated with the authorities or had that state of mind to cooperate with the authorities, and the Court asked Greenglass the following question:

"Q. Well, did you conscientiously withhold any facts that night?"

The Court: It should be "consciously."

Mr. Bloch: It is "conscientiously" here. I am quoting, your Honor, from the record.

The Court: All right. I understand.

Mr. Bloch (Continuing): "A. No, I did not conscientiously withhold those facts.

[fol. 384] "Q. And did you conscientiously tell substantially what you have told in court these past few days?

"A. That I did, and in other statements, because I couldn't remember at once.

"Q. Well, when you left that evening was there any understanding that you would make a subsequent statement?

"A. I suppose there was."

And then I asked him a question on cross-examination:

"Q. Didn't you tell your lawyer to fight this case for you?"

This is all referring to the time of his apprehension and the time of his arraignment. Incidentally, about that "conscientiously," you will find that on page 577 of the record.

The Court: All right.

Mr. Bloch: And the answer was "I did not."

Now, that was the state of the record as it went to the jury. Then these petitioners were sentenced to death. The next day David Greenglass was sentenced, and this is what Mr. Saypol revealed to the court in his remarks on Greenglass:

"When David Greenglass was arrested after the first [fol. 385] indictment in the State of New Mexico"——

And I might explain to you, your Honor, he was apprehended and arrested on that indictment—"I remember well how at his arraignment before the Commissioner in this District Mr. Rogge protested his innocence."

That is Greenglass's lawyer.

The Court: Greenglass's lawyer?

Mr. Bloch: Yes.

"Through Ruth Greenglass, his wife, came the subsequent recantation of these protestations . . . and the disclosure of the facts by both of them."

The Court: Let me ask a question, if I may, again. On the cross-examination of this witness Greenglass, was he

asked whether or not he had made prior statements to the United States Attorney?

Mr. Bloch: He was.

The Court: Did he admit that he had?

Mr. Bloch: He did.

The Court: Did you ask the Court to examine them to determine whether or not it contained contradictions to his testimony.

Mr. Bloch: Yes, the Court stated that there was no contradiction between the testimony that he gave in court and any statements that he may have given to the authorities [fol. 386] because he readily admitted that he gave statements. But it is only after Mr. Saypol disclosed that in fact there was a contradiction between what he said in court and what he incorporated in his statements did we know, and certainly, did the jury know or could have known the true facts of the situation.

The Court: Did you make application to the Court on the trial to examine the prior statements of Greenglass?

Mr. Bloch: Before I answer that, I remember the subject was discussed. I know the matter was discussed. He admitted that he made certain statements.

The Court: You know as an experienced trial lawyer that even though a witness admits that he made prior false statements, you have a right to examine those prior false statements for the purpose of bringing them out before the jury and showing the extent of the prior false statements.

Mr. Bloch: That is true provided they were prior false statements, but all he said, he did make false statements and those statements contained certain things.

The Court: In any event, your recollection is that you [fol. 387] did not make application for permission to examine those statements.

Mr. Bloch: With all due deference it would have been an improper request, because there was no inconsistency between his testimony at the trial and the purported content of his statements, and I am urging now that it was for the first time when Mr. Saypol disclosed the discrepancy that we found out about it.

The Court: You would have been entitled to inspect the

prior statements, prior inconsistent statements of the witness at the time of trial.

Mr. Bloch: His testimony did not disclose any inconsistency.

The Court: On cross-examination you inquired as to whether or not he had made any prior statements.

Mr. Bloch: He said he did.

The Court: Did you ask that those statements be produced?

Mr. Bloch: I did not, and I don't think it is proper because I think that you have to lay a foundation. I submit, your Honor, as a proposition of law you would have to do that, and I think Judge Kaufman felt the same way, that before one could ask the Court to have the statements of a witness produced one must show an inconsistency be- [fol. 388] tween his testimony and what is purported to be in the statements, and, as a matter of fact, the first witness for the prosecution was a man by the name of Ellicher, and I remember laboring for two or three hours on cross-examination, until Judge Kaufman was satisfied that I had shown not only inconsistency, but a knowledge on the part of the witness that he had made an inconsistent statement. It was only then that I asked for the production of the Ellicher statements and they were submitted to defense counsel.

The Court: The fact remains that you did not ask for the Greenglass statements.

Mr. Bloch: I did not, and what I am saying to the Court now is that I was misled in not asking for them because I did not know what I found out after the trial by virtue of Mr. Saypol's statements. I say that that was perjury and I say that it prejudiced the defendants, both in the eyes of the jury and in terms of adequately developing before the jury all the facts which would have seriously impaired the credibility of Greenglass in their eyes.

Now, then, your Honor, I would like to come to this coached evidence. Greenglass was a machinist at Los Alamos. This man had a formal education as far as high school. He never went to college. He never took courses [fol. 389] in the higher branches of mathematics or the higher sciences, or any of the fields of physics relating

to atomic energy. Yet this man testified that he drew replicas of certain sketches of lens molds, the detonating head of the Atom Bomb, as well as a complete cross section of the Atom Bomb in 1951, prior to trial, and for trial purposes, from memory alone without the aid of any coaching by any person or from any written scientific works or otherwise. Those sketches were then permitted to be introduced in evidence by the trial judge. In the Circuit Court we contested the admissibility of those documents. The Court of Appeals ruled adversely to us.

[fol. 390] But what is important is that these documents were graphic illustrations of the alleged subjects of transfer from Greenglass to the petitioner, Julius Rosenberg, and a co-conspirator named Harry Gold. And they were very, very dramatic and a very persuasive type of testimony. Now we find out from renowned scientists that it was impossible for a man of Greenglass's education to have done these things that he claimed he did, namely, to have drawn these complicated sketches of a most complicated mechanism which could only be performed, and that could only be performed by one that is highly skilled and proficient in the scientific field. And I say to the Court that the only way we can show that Greenglass perjured himself when he said that he received no outside help and they relied solely on memory is the way I have shown to the Court——

The Court: Now on that point, Mr. Bloch——

Mr. Bloch: Yes?

The Court: —as I read these affidavits of the men who were represented as experts and whom I accept as being experts in that field, they certainly express an opinion that it is their opinion that a man of Greenglass's background and experience could not have produced drawings solely from memory five or six years after he saw them.

[fol. 391] Mr. Bloch: Right.

The Court: But one of them, Kaiser—and I don't recall whether the others agree with Kaiser or not—says that it is conceivable that in 1944 and 1945 the said David Greenglass could have reproduced from memory sketches of several pieces of equipment which he had constructed or was in the process of constructing in his capacity as a machinist.

Mr. Bloch: That is right—'45.

The Court: Now apparently what these experts are holding themselves out to be—not experts in their scientific field and in the field of their specialized training but they are holding themselves out to be experts in what they believe to be the capacity of recollection of another individual.

Mr. Bloch: Your Honor, let me put it to you this way——

The Court: That is a new field for expert testimony so far as I am concerned.

Mr. Bloch: Suppose a semi-illiterate could walk into this courtroom and purport to argue before you abstruse questions of constitutional law: don't you think that it would be proper for a lawyer to aver that in his opinion a person of this kind of retarded intelligence would be incapable of properly presenting arguments of constitu-
[fol. 392] tional law.

The Court: Well, I don't like to answer questions propounded to the Court rhetorically. I would say that the situation you have outlined is not analogous to the situation here presented.

Mr. Bloch: Well, you see, your Honor——

The Court: What you are in substance saying is that one of Greenglass's limited education and training could work on a piece of machinery today, and tomorrow reproduce a rough sketch of that piece of machinery on which he had worked the day before, but that although he could do it within a short time after he had worked on the piece of machinery and his recollection and memory were sufficient to enable him to reproduce it the next day, his recollection and memory would not be sufficient to enable him to do it five years later.

Mr. Bloch: Yes.

The Court: Well, that is a matter of individual recollection on which expert testimony is worthless.

Mr. Bloch: Now, your Honor, first, maybe I ought to break down these exhibits for you for just one moment.

The Court: That is the way I understood the statement of Kaiser, and I was rather surprised when I read it. In the first place, what you are asking the Court to do is to accept expert testimony as to whether or not a witness is
[fol. 393] or is not telling the truth. Now——

Mr. Bloch: Whether he was capable.

The Court: —such testimony has been received in only one of two cases that I recall, and then only in the limited field as to whether or not the witness was mentally competent or whether he was a pathological liar, more from a psychiatric point of view than from any other point of view. I haven't had that situation here.

Mr. Bloch: Well, you see, I submit, your Honor, that you are dealing here with the construction of sketches which must presuppose a knowledge of scientific matter, and even though you could teach a parrot to repeat certain words, there are certain things that you can't teach a parrot and you can't teach a man of Greenglass's education, as these experts say, how to draw a sketch of a cross-section of the atom bomb, which set forth the function of each of its parts and the interrelation of these parts in order to produce a working mechanism. Maybe a Professor Urey.

The Court: I have seen little sketches drawn by little children or little boys of the so-called space ships, seven or eight years old. I am saying I have seen them in my own household, sketches of space ships which have amazed me, all properly labeled and designed.

No, I don't attach any importance to this so-called expert [fol. 394] opinion on the veracity of a witness.

Mr. Kunz: Will your Honor excuse me a second?

The Court: Surely.

Mr. Kunz: I happened to be present all during that trial.

The Court: Take your time, without any apologies.

(Mr. Kunz confers with Mr. Bloch, off the record.)

Mr. Bloch: Mr. Kunz suggested that I refine the facts for you to point out that so far as the cross-section of the atom bomb, which was Exhibit 8, Greenglass did not work on this mechanism, made no claim that he stole any blueprints or copied the sketch from any blueprint, but that he acquired snatches of information about some of the parts of the atom bomb from random conversations with certain scientists around the Los Alamos project.

Now I say to the Court that only an expert in a scientific field under these circumstances can state with authority whether a person of certain educational development is capable of drawing a cross-section of the atom bomb plus,

incidentally—and this is his testimony—an explanation of the workings of each part of the bomb.

Now I think this is something more—this is something more than memory—just as, your Honor, if I may use another illustration—if somebody will say to you that "I can [fol. 395] fly 2500 miles an hour in a ship that I built," it would be competent for an expert to come before you and say that this is at the present time scientifically impossible, that a man of this kind is not telling the truth when he made that assertion, and this is the purpose of this opinion evidence.

Now, of course, there is something more to this coaching. We allege that Greenglass was lodged after he cooperated with the authorities in the eleventh floor of the Tombs. And it is a matter of common knowledge among certain members of the criminal bar that the eleventh floor of the Tombs is reserved for informers. There is a certain concession that the officials accord to them because of their cooperation.

The Court: A certain degree of isolation.

Mr. Bloch: And a certain degree of isolation.

The Court: That is necessary.

Mr. Bloch: It may be. I don't want the question——

The Court: Prison discipline.

Mr. Bloch: I don't want to question the wisdom of that kind of separation from other prisoners. I merely cite that as a fact.

Now, Gold, who was a co-conspirator here in the indictment, likewise was lodged on the eleventh floor. I state [fol. 396] in my affidavit how that eleventh floor is constructed. There are no separate cells. The prisoners are permitted to fraternize, and it was inevitable that Gold and Greenglass were thrown in constant contact with each other.

Gold happened to be a chemist, and if I judge the man on the stand, and he testified during the trial, he is a very, very bright and intelligent person and pretty well trained in scientific matters. We make the averment and the charge that Gold—at least Gold coached Greenglass in making these sketches.

The Court: Well, didn't you make that same claim or urge that same claim on the trial?

Mr. Bloch: I did not.

The Court: Why didn't you?

Mr. Bloch: Because I didn't know about the eleventh floor —even though I had tried some criminal cases.

The Court: You told me it was a matter of common knowledge.

Mr. Bloch: It is a matter of common knowledge amongst members who are—who specialize in criminal law, and usually it is the State criminal bar that knows about these things, and somehow in the Federal Building here, in the Federal court, practitioners don't know; but certainly I [fol. 397] would say that ninety-nine out of one hundred practitioners wouldn't know what you were talking about when you talk about the eleventh floor of the Tombs. But I urge that——

The Court: They do not know about the eleventh floor but they know about singing quarters. I think it is so popular you must have heard about it.

Mr. Bloch: Never knew where they were.

The Court: Of the exact location. You must have known that it is a certain portion of the jail known amongst those who practice criminal law as the singing quarters.

Mr. Bloch: Yes, but there is a difference between knowing where the singing quarters are and knowing that there are no cells which keep the singers away from each other. I never knew that there was one room where a lot of cops where they all come together.

The Court: Well, didn't you interrogate both Gold and Greenglass as to whether they had contact with one another?

Mr. Bloch: I didn't interrogate Gold at all because Gold didn't connect my client and I did not feel it necessary, and so far as Greenglass—I am going to ask that——

The Court: Excuse me.

Mr. Bloch: Oh, I beg your pardon.

[fol. 398] The Court: You mean that Gold was not cross-examined?

Mr. Bloch: Not at all. He involved Greenglass and according to me theories of the case he never involved the Rosenbergs.

The Court: That was a calculated judgment on your part which involved certain risks which you accepted.

Mr. Bloch: It certainly was; certainly was. Moreover, your Honor, I say to the Court that if the records of the Tombs were subpoenaed, and the guards who were stationed at the eleventh floor came before the Court, you will find that books were brought in to Greenglass and that Gold was in consultation with others.

Now let me see what the Government says in their opposing affidavits. Mr. Lane makes no denial of my allegation that the prosecuting officials of the FBI aided in the coaching of Greenglass. The only affidavits in opposition to our papers are the affidavits of two FBI agents who say that they personally did not aid in any coaching and are very careful and meticulous in their formation and say "upon information and belief we don't think that any other agent of the FBI aided in any coaching."

Now I think that this is virtually an admission of the allegation and I say it is sufficiently serious to move the [fol. 399] Court to at least *a* grant a hearing on this question because on the question of coaching of Greenglass, you go to the very heart of the Government's case, because I say that it was on the basis of those sketches and on the basis of the testimony of Greenglass that laid the foundation for their introduction that the jury was probably moved in bringing in a verdict of guilty against these defendants.

I would like now to come to the third point and I am going to conclude and I am going to make this relatively short. The third point shows that there were no secrets concerning (1) the alleged subjects of transfer here, and (2) with respect to any and all processes that went into the construction of the complete atom bomb that was first dropped at Hiroshima and later the improved bomb at Nagasaki—that I am not going to go into this very involved scientific thesis, your Honor, except to say that from these facts, from the thesis, from the documentation, you can see merely by a reading of the journals that I cite, that in other countries, and particularly in the Soviet Union, they knew both the theory of all of the processes as well as the reduction of those theories to practice and that the only secret of the atom bomb was when it was dropped, namely, the secret was that it could work*d* and this the United States revealed [fol. 400] when they revealed that they dropped the bomb at Hiroshima.

Now if this is true, then it is our contention that this court had no jurisdiction to impose sentence because these so-called secrets or classified material were matters of public knowledge and within the meaning and purview of the Heine case there could not have been that intent that was an essential ingredient for a violation of the Espionage Law, and it doesn't make any difference whether it was an indictment for espionage or an indictment for conspiracy to commit espionage; that intent had to be present before a conviction could be obtained. And if, according to the Heine case, where it is public property, the courts will not spell out such an intent but in fact state that there was no such intent under such circumstances, then we say that in these proceedings these defendants were improperly convicted and improperly sentenced because this court had no jurisdiction, or, in summary that they committed no crime.

Now I say under the 2255 application, this is perfectly proper. This goes to the heart of justice. It certainly would be astounding to permit people to be jailed or to have their lives taken away if in fact and in law they committed no crime, and I believe that Section 2255 was designed to attack a collateral judgment of conviction in order to show [fol. 401] those things which evidence a miscarriage of justice.

And so I say in conclusion, your Honor, and I see that I am away past my time and I apologize——

The Court: Take your time.

Mr. Bloch: And I apaologize. I say that on the total showing that we have made here in our papers, in order to avoid a serious miscarriage of justice, either the relief—that the request should be granted or at the very least that a hearing be held to determine certain factual questions which have been put in issue by virtue of the allegations of the opposing papers. And it is only upon a full examination through the taking of the testimony in open court before your Honor that your Honor can properly determine whether or not the petitioners are entitled to the relief that they ask for, and of course we submit that they are entitled to that relief.

Thank you very much for your patience.

The Court: Mr. Meyer, you can start now, or I can give you a few minutes, if you wish.

Mr. Meyer: I think possibly a few minutes' adjournment would be helpful.

The Court: Then, Marshal, would you open some of those windows while we take five-minute adjournment.

(Short recess.)

[fol. 402] Mr. Meyer: May it please the Court, I represent the defendant Morton Sobell who was tried on the same indictment at the same trial as the defendants Rosenberg, who pleaded not guilty, who was convicted by the jury and sentenced to thirty years imprisonment by the Court at the conclusion of the trial. I am here on a separate application, on separate papers, presenting separately, so far as I see it, his claim to relief under the same statute concerning which Mr. Bloch has argued on behalf of the defendants Rosenberg. Mr. Bloch has covered in some detail a substantial area of the ground that is covered by the claim for relief made on behalf of the defendant Sobell. I expect to endeavor to confine myself insofar as Sobell's petition is based on similar grounds, to supplementing, in deference to what I feel my obligations is to the Court, what Mr. Bloch has said.

I think what is most important, however, is that I should address myself to the points in which I find that there is a difference in the petition presented, or differences in the petitions presented on behalf of Sobell from the petition presented on behalf of the Rosenbergs.

I think the whole chronology of the case, some of the aspects of the pretrial, the trial proceedings, have been such that perhaps at times this separate quality may not have been recognized. It was recognized on a point which I am [fol. 403] not going to reargue here, but mention as a historical fact, it was recognized in the Court of Appeals for this Circuit, one of the judges, Judge Frank, who happened to write the opinion for the majority, dissented from the affirmance of Sobell's conviction.

I have before me only a very brief affidavit in response to Sobell's petition filed by the United States Attorney. I find it hard to understand how he could have made the statement

that all the other contentions raised in the Sobell petition are identical with those raised in the Rosenberg petition, and that is what I would like principally to address myself to if the Court please.

The Sobell petition raises six points, as I have indicated in the brief summary which I handed up to your Honor, and I want to address myself particularly now for the purposes of illustration to the second point which is denominated as (b) of the petition, and which is set forth by way of supplementation in some detail in the affidavit.

By way of introduction I would just summarize briefly what happened at the trial and in the Circuit Court of Appeals with respect to the nature of the accusation against Sobell. When the first superseding indictment was handed up in October of 1950, that indictment did not differ in substance or in the nature of the crime alleged from the [fol. 404] previous indictment handed up in August against the Rosenbergs, Greenglass, Gold, and others. The name of Sobell was simply added. There is no reference in the overt acts to the nature of what it was claimed Sobell had done. Sobell's counsel, Mr. Kunz, who was one of his trial counsel, made efforts by way of motion to dismiss the indictment, motion for inspection of grand jury minutes, and ultimate by way of motion for bill of particulars, to find out something more of the nature of the accusation against him.

I don't want to say and it is immaterial now to say whether or not the indictment sufficiently informed the Rosenbergs of the nature of the offense alleged against them, but at least by the representations that were brought before this court—it so happened your Honor was sitting at the time—it seemed clear that Sobell was entitled to some particulars, and the court directed that a bill of particulars be granted.

The Court: I think we are past that stage. I think it is now the law of the case that the indictment coupled with such particulars as I directed be furnished were sufficient in law to inform Sobell of the crime charged against him.

Mr. Meyer: I don't raise any question about that.

[fol. 405] The Court: Yes.

Mr. Meyer: (After conferring with Mr. Kunz) That is for the purpose of this motion. For the purpose of this motion.

In any event, your Honor, it transpired at the trial that despite the apparent nature of this indictment charging exclusively or principally a conspiracy relating to espionage having to do with the atom bomb, and despite the statements issued at the time that Sobell was arrested, at the time that he was brought back to New York and in the period immediately preceding the trial that no evidence was offered or intended to be offered connecting him in any way with any espionage having to do with the atom bomb project; and the essence of that is summed up in the remarks of Judge Kaufman in sentencing Sobell when he said that there is no evidence in the case of any activity on his part having to do with the atom bomb project.

Now, Sobell's counsel at the trial could not know and by virtue of their lack of success in obtaining a more enlightening bill of particulars, were not able to ascertain in advance of the trial that this was going to be the case. Consequently the claim that is made in the Sobell petition concerning the pretrial publicity which repeatedly and in black banner headlines characterized him as an atom spy was one which [fol. 406] they could not reasonably under any view of the law have anticipated until the time arrived at the close of the Government's case when it became clear to them for the first time that there was no evidence of participation in any form by Sobell in atomic espionage.

Now the Circuit Court has affirmed the conviction and in so doing it has held that the trial was properly held on a single indictment, that under the interpretation of the law of conspiracy advanced by the United States Attorney, which the Supreme Court has declined to review here, that Sobell could have been properly tried on the same indictment, that merely because of the proof tendered concerning alleged other activities in which he participated, supposedly with Jules Rosenberg, it was proper to hold him as a member of a more embracing conspiracy which did not necessarily confine itself to atomic espionage.

However, insofar as the question which is now presented the Court is concerned, I find—let me interrupt for just one moment. I want to say this: that in relation to the question of pretrial publicity I join completely in the arguments made by Mr. Bloch. I agree with your Honor's tentative

statement that if there was a violation of due process by the bringing about of a prejudicial, poisoned atmosphere, that it is not the type of constitutional right that can be waived, but I would like to say that over and above that there could [fol. 407] not possibly have been any claim of waiver or lack of astuteness or lack of fidelity to their client's cause on the part of Sobell's counsel at the outset of the trial or any inference drawn as to their attitude to the pretrial publicity when it was until the end of the trial when it became known to them that accusations and characterizations of Sobell as an atomic spy were not only unfounded but had all along been known to the prosecution to be unfounded.

Now the nature of this confusion which has constantly penalized, prejudiced Sobell in his defense, is reflected even today when within the last days even a cautious newspaper like the New York Times, characterized him, in reporting a particular court proceeding here, as the convicted atom spy.

Your Honor, this proceeding insofar as Sobell is concerned, is based among other things on a proposition that there existed in 1950 a creation of the organs of public sentiment, an image, a demon called the Atom Spy, which was more reprehensible, more outrageous than any type of culprit, than any that had ever been brought to the bar of justice since the beginning of the world. It was based upon circumstances which are sufficiently outlined in the affidavits, it was based upon the natural fear and horror which every one of us, which all of us as members of the com- [fol. 408] munity, and had about the employment of this weapon since the close of the last war and the threat and apprehension about its future employment should, God forbid, another war come.

In the face of that I say that not only did the United States Attorney violate his duty to refrain from improper methods to produce a conviction, but he went out of his way—and when I say the United States Attorney I refer to the prosecution collectively; the director of the Federal Bureau of Investigation, the Attorney General, and the special agent in charge of New York, all of whom are shown by the exhibits annexed to the petition to have issued statements at one time or another, giving the various characterizations which are complained of here. Not only did they go

out of their way in not refraining from improper methods to bring about a conviction but they overreached themselves by this repeated characterization, this repeated description of Sobell as an atom spy.

The answering affidavit does not respond to the claims made in the Sobell petition with respect to this point. All that is contained there is the single statement which I am trying to show is rather inept that the contentions raised in the Sobell petition are identical with those raised in the Rosenberg petition. They are not identical as to this point. [fol. 409] There are other respects also in which they are not identical.

Concomitantly with the repeated allegations that Sobell was an atom spy, the wholly false, wholly unjust accusations of that character which thoroughly blackened this man in the eyes of the community where he was to be tried, concomitantly with this, allegations and assertions were made repeatedly that he was a co-conspirator of Fuchs, that he was a member of the Fuchs spy ring, that this was another member of the Fuchs spy network——

The Court: Counsel, all of these things that you now urge were known to the defendant Sobell and his counsel prior to the impaneling of the jury, weren't they?

Mr. Meyer: If your Honor please, Sobell was not in this country at any time from June 20 until August 18. August 18 he was in custody.

The Court: All right, but from August 18 until the date of the beginning of the trial, March 6, 1951, he didn't live in a vacuum, nor did his counsel.

Mr. Meyer: He was in confinement starting with August 18th.

The Court: But his counsel wasn't in confinement. He wasn't deprived of means of communication with the outside world. He wasn't held incommunicado. He wasn't deprived of access to current newspaper publications.

Mr. Meyer: He was deprived, if your Honor please, of [fol. 410] the opportunity of going back and making the study which has taken me several weeks to undertake with respect to these——

The Court: You don't have to make a study of things of common knowledge. That is something I don't grasp. All

of the defendants here urge that the atmosphere, the public atmosphere was such that it was impossible to give these defendants a fair trial, and yet the records show no objection of that nature was raised before the trial court, that no application was made for a continuance on that ground throughout the trial. No objection of that nature was raised. At the time of sentence nothing was said about it, after sentence and pending the appeals nothing was said about it by way of a motion for a new trial or a motion for arrest of judgment. You can't expect the Court is going at this late date to attach significance to a situation you say existed which you yourselves did not feel of such importance as to urge upon the trial court.

Mr. Meyer: If your Honor please, there is a particular point in connection with this situation that gives Sobell a claim which it appears to me removes from the case any question as to whether or not he should have raised this point before the trial. It is the very point which the Circuit Court in its opinion here in another connection conceded [fol. 411] when it said:

> "Sobell's counsel argued that on the basis of the indictment and information obtained from an unsuccessful attempt to get a more enlightening bill of particulars, it was impossible for Sobell to ask for a severence earlier on these grounds. Sobell's position seems well taken, although it is not necessary to decide any question of waiver involved in his failure to request severance."

The Circuit Court found that Sobell's position in not making complaint concerning the separate nature of conspiracy prior to the close of the Government's case when it pation in atomic espionage, that his position was well taken in claiming there was no waiver in not raising the point prior to that date. He could not possibly——

The Court: The Court of Appeals held, I think by unanimous decision, that the defendant Sobell was not prejudiced by being obliged to stand a joint trial with the other defendants.

Mr. Meyer: If your Honor please, that was not unanimous. Judge Frank dissented.

The Court: I understood Judge Frank's dissent to be upon an entirely different ground. Judge Frank's dissent was predicated upon the ground that he found that there [fol. 412] were two separate and distinct conspiracies here.

Mr. Meyer: That is a branch of what your Honor has just said that if there was a separate——

The Court: It is no branch as I read it.

Mr. Meyer: That if there were separate and distinct conspiracies there would have been prejudice. That was the point.

As a matter of fact ,the court unanimously indicated that if it were found there were separate and distinct conspiracies—and I believe Judge Frank was speaking for the majority when he said this—"then prejudicial error has been committed, for Sobell was jointly tried with major atomic energy spies whose acts and declarations were held binding upon him."

That is page 600 of 195 Fed. (2d). That is to say if it had been found that there were separate conspiracies then the separate question which sometimes has to be argued as to whether there was also prejudice besides the separate conspiracies, would not have had to be argued because the court unanimously held in those circumstances that as a matter of law it would have been prejudice.

That, however, is not the point that I am arguing here. I don't care here to reargue or to reraise or to retry any question which has been passed upon by the Circuit Court of Appeals in this case. The point that I make complaint of [fol. 413] now is that repeatedly his character and name was blackened before the trial by an accusation which is not only one of which he was innocent but one of which the prosecution knew he was innocent at the time they were making the accusation.

The Rosenbergs too, I hear on the claim that they are innocent, but at least the prosecution offered evidence which if believed may have demonstrated their guilt. That is a different point.

Here the prosecution did not offer at any time during this trial any evidence of knowledge, any evidence of complicity directly or indirectly in any way by Sobell in atomic espionage. That statement is made in my affidavit. It is not

controverted in the answering affidavit, if your Honor please.

I say that for the prosecution in those circumstances to have repeatedly at the time of his arrest and thereafter and in the immediate pretrial period, have characterized him or have caused him to be characterized as an atomic spy, was the type of prosecutor-connived violation of due process which vitiates this conviction, and that it could not have been known to Sobell until the conclusion of the trial that the prosecution did not have any evidence to tender, any evidence to offer which would connect him directly as a participant in atomic energy espionage; and this is true [fol. 414] despite the fact that he was broadly tried on a theory of single conspiracy.

The question as to whether or not a conspiracy can be held as a matter of law to be broad enough to include one who had no knowledge of the particular type of conduct which he is being accused of here has nothing to do with the point. He wasn't called a co-conspirator with Rosenberg; he was called an atomic spy, and that is, if your Honor please, precisely what Judge Kaufman said that he was not at the end of the trial. And I say, as an indication of how this blackened his character, how this confusion persisted throughout the trial and even persists today, is the fact that even today he is referred to and characterized in the public press as an atom spy.

Now this monster of the atom spy which was invented in 1950, may or may not have been the evil thing which it purported to be. The scientific evidence tendered by Mr. Bloch has a bearing on that, but it is not the point that I am addressing myself to here. There was this creature drawn, this picture drawn of Claus Fuchs as the most notorious spy in history, and the attempt constantly to link and characterize Sobell as having been linked with him. He did not know at the beginning of the trial what proof, what type of testimony would be tendered on the issue. It was only when we come to a point more than halfway [fol. 415] through the trial that the prosecutor conceded for the first time that it was not claimed that any of these defendants were co-conspirators with Claus Fuchs, that they were not alleged to have conspired or connived with him; and yet during that whole previous period they were

repeatedly characterized as having connived with this British scientist who I think the Court will take judicial notice was referred to as the most notorious spy in recent history, who sent terror through the hearts of all of us because of the publicity given to the proposition that he has not only passed on information relating to the atom bomb, but also with relation to the hydrogen bomb.

I am addressing myself to this point because it seems important to me to get across the fact that because of concealment, because of the fact that counsel were misled, the question could not be raised in advance of the trial on behalf of Sobell. It could not be raised in any form directly or indirectly until most of the trial had passed, and then counsel, I think properly, were so preoccupied with the immediate problems of the trial that they could not then go back and make a study and make a presentation to the trial court of the nature of this damning pretrial publicity.

Now if your Honor please, there was another point in [fol. 416] respect of the indictment of Pearl which also has some bearing on this question, and I would like to address myself to that.

Before I come to that, I would like to mention one point which I don't believe Mr. Bloch addressed himself to and that is that the answering affidavit of the United States Attorney does not respond to, does not explain in any way how it was that Pearl was not brought to trial for a period of eighteen months after this indictment which seemed so suddenly important to bring on March 13, how it was that at the time of his arraignment it was stated that the Government would be ready to bring him to trial within a few weeks, how it was that it was stated shortly thereafter in this court by the representative of the Government that the case against him was a very simple one and that the evidence against him was very strong, and yet how it is that even when Pearl's attorney by order to show cause last June brought on a motion to compel the United States Attorney to give him a speedy trial, that the United States Attorney opposed most vigorously the efforts of Pearl's attorney to get that trial for him, and stated that there were undisclosed matters, undisclosed matters having to do with the Rosenberg and Sobell case which made it necessary that

Pearl delay obtaining the day in court for vindicating his name.

[fol. 417] Now I know no more than what is in the records of this court. I know nothing about the Pearl case. I don't know his attorney. But it seems to me that enough is shown from the records of this court, including this claim about undisclosed matters, to suggest that it is proper to draw one of two inferences: either, it seems to me, the United States Attorney at the time of the Pearl indictment, did not seriously intend to bring him to trial, or in the alternative—and this is an even more dreadful inference to draw—the prosecution is in the possession of facts or is aware that facts will come out on the trial of Pearl which shall demonstrate the innocence of the petitioners in this case.

The Court: May we not draw the additional inference which was expressed by—I think it was by United States Attorney Morris or Martin last June, set forth in Rosenberg's petition—that the United States Attorney has good and proper and sufficient reasons for delaying this trial? I don't see any reason why that statement should not be accepted at its face value. I attach no significance to the fact that the Pearl indictment has not been tried.

Mr. Meyer: If your Honor please, they are undisclosed reasons.

The Court: Well, there is no obligation on his part, on [fol. 418] the United States Attorney's part, to disclose in detail why he hasn't tried a particular indictment. We can't infer bad faith on the part of any public official. In fact the law is quite to the contrary.

Mr. Meyer: One does not start out, if your Honor please, with the assumption of bad faith, but when the circumstances are linked together, including the fact that the alleged perjury occurred six months before the indictment, the fact that perjury is a serious offense, and that there has been no trial for a period of eighteen months after the indictment——

The Court: The trial of the case might prejudice an investigation that the United States Attorney is conducting in relation to some far more serious matter, far more serious than perjury. We may not sit here in judgment on

the exercise of discretion that is vested in law in the United States Attorney.

Mr. Meyer: If your Honor please, the discretion that is vested in law in the United States Attorney in connection with this case I must question, I feel obliged to question, in view of what has been set forth in the petition, what has been shown in our papers as to the effect of this indictment in the trial of the case against Morton Sobell. I must raise the question because to me, as I viewed it, it had such a serious effect.

[fol. 419] The Court: I don't find objection with your raising this point, but I say I don't follow you in drawing the inferences that you expect the Court to draw. They don't logically follow.

Mr. Meyer: Well, when there is an inconsistency between the statement of the United States Attorney in April 1951 that he is ready for trial in a couple of weeks and the statement that he makes in June 1952 that he cannot bring the case to trial until all aspects of the Rosenberg-Sobell prosecution are concluded, it would appear to me that some question is presented which requires being examined into by the Court.

The Court: No, that doesn't present to me an unusual situation or an unusual problem that confronts the prosecutor. It is quite customary, quite a usual situation where today a presecuting official may feel that the interests of justice will best be served by moving for a speedy and prompt trial and tomorrow or next week or next month facts may come to his knowledge which dictate to him that the interests of justice require that the trial be postponed and held in abeyance until some investigation he is conducting has been completed and involving a matter of this magnitude I would not say that eighteen months is an unusual or extraordinary delay.

Mr. Meyer: If your Honor please, taken in the abstract [fol. 420] it may not be an unusual or an extraordinary delay. I say this, that if the trial could have waited for a period of eighteen months the indictment might properly have been withheld for a period of two weeks.

The Court: It might or it might not. The filing of the indictment rests with the grand jury. This thing of sealing indictment is a practice that I don't approve of, never

have approved of, and there is no authority in the statute or law for it.

Mr. Meyer. And the initiative for sealing the indictment did come from the United States Attorney, one of the attorneys.

The Court: I don't see anything wrong in that. And certainly there was no point in raising it during the trial.

Mr. Meyer: Well, your Honor has before you the nature and extent of the point raised concerning it.

The Court: Yes. I haven't had a chance to read your briefs on it, but that is my offhand impression: I attach no significance to that Pearl incident at this time.

Mr. Meyer: In respect to the Pearl incident, I wanted to add one aspect in which that, in my opinion, unjustly affected Sobell, and in addition to the manner in which it prejudiced the trial of all three of the defendants it prej-
[fol. 421] udiced his trial. Whatever may be one's view, we are now bound by the affirmance of Sobell's conviction by the Circuit Court of Appeals as to the question of whether or not the jury had properly found that it was a single conspiracy. But as the United States Attorney and the Solicitor General conceded, that was a jury question as to whether or not there was a single conspiracy, as to whether or not Sobell had joined that conspiracy; and I say that there was added to the scales of justice, to the influences that were operating on the jury's mind at the time of the Pearl indictment, an extraneous instrument of persuasion.

The Court: There is no evidence before me that the jury even knew about this Pearl incident.

Mr. Meyer: The evidence that is before you, your Honor, is that the Pearl indictment was reported on the front page of every morning newspaper on March 15 of 1951.

The Court: Well, there is no evidence that it came to the knowledge of any one of these jurors.

Mr. Meyer: There is no direct evidence of that. There is evidence that it appeared on the front page of every metropolitan newspaper on that date, and by the nature of the headlines it did not purport to relate the case on trial and the trial judge had admonished the jury in prev-
[fol. 422] ious admonitions only about reading about this

particular case only in the newspapers. It seems to me that there is a Federal rule which is held I believe in the Ogden case, which is cited in my affidavit.

The Court: Did you during the trial bring this to the Court's attention?

Mr. Meyer: If your Honor please, I was not of counsel at the trial. I was retained on the appeal.

The Court: I didn't know that. Was it brought to the Court's attention? Was a request made of the Court that the jury be polled to determine whether or not they had read this article or read of this incident either during the trial or after rendition of the verdict?

Mr. Meyer: No such request was made.

The Court: All right.

Mr. Meyer: The facts are stated in the reply affidavit of Mr. Kunz, and to the extent that the record alludes to the incident at all, at the beginning of the trial day of March 15th it is now before your Honor.

The Court: All right.

Mr. Meyer: Now if the Court please, there is one other aspect in which the Sobell petition with respect to improper prejudice in the news in advance of trial differs from the Rosenberg petition, and I also want at this time to call that to the Court's attention, and that is in respect of pretrial [fol. 423] statements which have been attributed without denial here by the United States Attorney, to press releases by the Attorney General, press releases by the Director of the Federal Bureau of Investigation, and to statements made by Mr. Saypol and his assistants to the effect that the defendant Sobell, petitioner here, was characterized as having fled from the jurisdiction of the court. These appear in two forms in the exhibits that are before your Honor. There are statements simply to the effect that he fled to Mexico in June, or in words or substance to that effect.

The Court: Did Sobell take the stand as a witness?

Mr. Meyer: No, he didn't.

The Court: The Rosenbergs did, but Sobell did not?

Mr. Meyer: That is correct, your Honor. The Government had conceded and contended as a matter of fact most vigorously, that on the record before the court it was a

question for the jury as to whether or not Sobell's absence from the jurisdiction was flight or whether he was present, as one of the witnesses testified, in Mexico on a vacation. And, as a matter of fact, there was certain other evidence which I won't go into now which was brought in to attempt [fol. 424] to rebut the possible inference that he was on vacation. Yes, the contentions as to that and what the jury might or might not have believed as to that were actually disposed of, were closed in the public mind from the very moment when on the front page Sobell was characterized as having fled, as having been described by J. Edgar Hoover as having left because of the arrest of David Greenglass, although there was no evidence produced at the trial that he ever knew or ever heard of David Greenglass; and moreover, one of the newspapers at least made statements which were not even offered in evidence, saying that it was believed that he was making efforts to get a passport to go to the Soviet Union or a Soviet satellite country. No such evidence was tendered at the trial. Yet the impression was left on the mind of the public that the prosecuting authorities had knowledge that this is what the defendant was doing.

The Court: A public official, even if he makes a statement of that kind, doesn't grant a defendant immunity from trial or prosecution for a crime that he has committed. The only claim that a defendant might urge would be that he be entitled to a continuance or an adjournment, but certainly not to a dismissal of an indictment. Now here you made no application for an adjournment.

Mr. Meyer: If your Honor please, it seems——

[fol. 425] The Court: You certainly were not entitled to a dismissal of the indictment even if the head of the FBI did make an erroneous statement or issue an erroneous or misleading press release.

Mr. Meyer: I don't think that question is before the Court as to whether or not there should be a dismissal of the indictment.

The Court: Of course it isn't, because you weren't entitled to a dismissal of the indictment. At most you were entitled to an adjournment, and you made no application for an adjournment.

Mr. Meyer: The question here, as I see it, is this: From time to time—and it is probably a question that constantly comes up—newspapers by virtue of their initiative and their desire for sensationalism will dig up or ascertain in one form or another damaging material in relation to a defendant.

[fol. 426] When they do that without the knowledge or the connivance of the prosecuting authorities, you have one type of case, and the courts have to wrestle with those cases. It is a tough problem as to what to do, what the interests of justice require and whether the interests of justice can be prejudiced by what the newspapers do on their own initiative. Here, however, we have something quite different, we have, I believe, on this record a showing of constant, direct participation at every stage by the prosecuting authorities in fostering a community opinion, belief and prejudgment about these defendants. To me, if your Honor please, this is as much the contriving of a conviction by a violation of due process of law as the direct participation of the prosecution in the use of perjured testimony.

It seems to me, that well, even with the cases the United States Attorney cites in this circuit—the Weber and the Moran case—in one of which some reference is made to the necessity for raising the question in the trial—those were cases where it was not the public prosecutor who was shown to have participated in and prompted the damaging pre-trial publicity. In both of those cases the nature of the defendants and their prior testimony before a Congressional committee was such that it became possible for the newspapers on their own initiative to have made statements [fol. 427] concerning their——

The Court: But such publicity only becomes damaging to a defendant when it makes it impossible to secure a fair and impartial and unprejudiced and unbiased jury. Now there is no proof here and there is nothing in the record that has been submitted to me that shows that it was impossible to secure a fair, unbiased and unprejudiced jury. There is no objection made by the defendants to proceeding with the trial on the day on which trial began because of an unfavorable public attitude which made it impossible to secure an unprejudiced jury.

Mr. Meyer: If your Honor please, the exhibits, I believe, must speak for themselves as to whether or not it was possible to secure a fair and impartial jury concerning this case in this city in March of 1951. The very fact that the jurors were polled or rather interrogated by the trial judge in advance of the trial, has not direct bearing on the issue insofar as the Court of Appeals for the First Circuit has analyzed it in the Delaney case. As the court said there, in respect to the hostile atmosphere engendered by the extra courtroom publicity.

> "The fact that the defendant failed to exhaust his peremptory challenges at the time the jury was being selected was completely immaterial. The defendant had little or no reason for assuming that one juror [fol. 428] rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions, all of them having affirmed in answer to an inquiry by the trial judge that they were prepared to determine Delaney's guilt or innocence solely on the basis of evidence produced at the trial."

Moreover, the Court, I think properly there pointed out that it was not incumbent upon and not any conditional obligation of the defendant to move for a change of venue, as that option is available.

The Court: That is right, but that is a case where there was a special and specific application made for the adjournment of a trial and it was urged before the trial began, that the reaction from these legislative hearings held on the very eve of the defendant's trial was of—created publicity, extra-courtroom publicity, as it is described here, of a sort like to prejudice the defendant in the trial, and that a sufficient length of time had not elapsed since this damaging publicity.

Mr. Meyer: If your Honor please, the remedy was taken advantage of in the Delaney case of moving for a continuance. That remedy was not sought here. I think I have shown in my papers—I have contended this afternoon that at least in two respects the nature of the pretrial [fol. 429] publicity was such that Sobell and his counsel were misled into not making a motion in advance of trial

with respect to it because of the wholly unjust and wholly false characterization concerning his participation in espionage. And it is for that purpose, it is for the purpose of providing a remedy for a defendant who is convicted in violation of the Constitution, who in making a showing by facts extrinsic to the record, or, as I think your Honor has indicated, by facts which appeal to the Court's conscience, that Section 2255 was enacted, and it seems to me that where we have such a severe sentence as a 30-year prison term for this defendant, where we have a capital sentence in the other two cases, in the light of the facts contained in our affidavits and the showing made on this application are such as must appeal to the Court's conscience and that their question as to whether or not an application was made at the beginning of the trial cannot in the nature of things be decisive or have substantial bearing on their right to relief if the showing is made that the type of preconception was fostered repeatedly and continuously during the pretrial period on a sensitive subject—on a subject on which every citizen of the United States must have had a raw nerve exposed; the question of the threat of atomic warfare. [fol. 430] It is in relation to that that I say that there must have been a very, very special duty on the part of the prosecution to have leaned backwards to assist and to participate in seeing to it that these defendants had a fair trial in every aspect, and I say that there was exhibited by the prosecution in this case a want of confidence in the ordinary and normal processes of a courtroom, a want of confidence which was exhibited by these efforts prior to the trial constantly to bring to the attention of the community matters which inevitably produced a preconception, a widespread preconception which had no alternative except to bring about a judgment of conviction.

Now, if our Honor please, I want to pass on to another point in relation to my contentions here. I have presented a point which is not based on any factual claim stated in the petition. It is a point of law which the United States Attorney's answering affidavit incorrectly characterizes as having been presented in point 2 of Sobell's petition to the Court of Appeals for rehearing. That is not the fact. It was not presented to the Court of Appeals. It was not raised in the Court of Appeals, and as a matter of fact it

was raised only for the first time in the petition for rehearing in the Supreme Court of the United States. I think your Honor is aware that the effect of the decision of the [fol. 431] Supreme Court of the United States in denying rehearing is not to intimate any opinion one way or the other on the merits of the claim that was made. The claim that is made, in brief, as I have stated it in the petition is that the use on this trial of evidence which was evidence in effect of general intent to betray, of general treachery as purporting to be evidence of the specific intent required by the Espionage Act under which the defendants were being tried, that the use of that evidence was in violation of the Treason Clause of the Constitution.

Now I have briefed this point for your Honor is a separate memorandum. I have pointed out there the special circumstances in this case which made it understandable that Sobell's counsel did not raise the point at the trial, for the point was not raised at the trial.

Evidence was offered during a very limited period, from 1939 to 1941—four years before the alleged conspiracy is supposed to have begun, Sobell was, according to one of the witnesses, a member of the Communist Party. At the time that that evidence went in the trial judge said he was allowing it to come in on the theory of motive. However, in his charge to the jury for the first time he described it as evidence of intent. Now this was objected to at the time it came in. It was objected to as irrelevant, immaterial and [fol. 432] incompetent and prejudicial, but the constitutional objection that it involved a violation of the treason clause of the Constitution was not made at the trial.

Now I am addressing myself to the analysis of the treason clause of the Constitution which is found in Cramer v. United States, as my basis for the contention that in addition to and apart from the other objections which were made by Sobell and his counsel in the trial court, and the Court of Appeals, there was a constitutional objection to using this evidence as evidence of specific intent, for it was in the Cramer case, if your Honor please, that the Supreme Court pointed out, after having analyzed at some length the history and nature of the treason clause of the Constitution, that the whole purpose of the two-witness rule, of the requirement that there be two witnesses to an overt act,

was because of the generally virulent, the generally passionate type of accusation that treason involves and because perjury in such a case is so easily made against innocents.

In that case the Supreme Court left an area for the operation of such statutes as the Espionage Act by saying that where there was proof of specific intent required under a specific statute, that acts detrimental to wartime peril might be published by Congress provided—and this is the proviso on which I rely—that there is not used in such a prosecution evidence of treachery—and I think these [fol. 433] are the precise words of Mr. Justice Jackson—evidence of treachery and general intent to betray, and provided that the trial is focused on the specific intent of the defendant.

It is just the reverse of what Justice Jackson admonished, that occurred in this trial, for the evidence that was offered on the question of political affiliation went in subject to connection. The connection that was offered was offered in the person of a witness named Bentley, who testified as a quasi-expert on what the significance of political affiliation with the Communist Party was, and the conclusions which she tendered to the jury, which the court accepted, were, in effect, that it could be equated with a general treacherous intent, and it was on that proof that the defendant was then convicted, although there was against him with respect to the alleged overt acts in which he participated the testimony of but a single witness, one Max Ellinger.

I want to extend my argument—

The Court: I will read your brief. I haven't had a chance to read your brief on that point. It was handed in to me this morning.

Mr. Meyer: Yes. I have just stated the nature of it.

[fol. 434] The Court: I will give that matter very careful consideration, as I will, of course, the other points but that point particularly I will have to examine.

Mr. Meyer: Now, I just want to summarize what appeared to me some issues of fact which, as I have analyzed the United States Attorney's affidavit in response to the Rosenberg petition and the content of both——

The Court: There may be factual issues here but the

Court is not required to take testimony on factual issues which are irrelevant and immaterial.

Mr. Meyer: If the nature of your Honor's ultimate ruling should be that these factors are elements——

The Court: At this time I see no occasion to take any oral testimony. I am going to withhold final decision on that until Friday, until after I read the affidavits that Mr. Bloch and you may submit.

Mr. Meyer: Well, I just want to address myself to a few of these to indicate, if your Honor please, what I think is a very substantial issue of fact here: the claim, for example, that what we have proffered is simply routine statements to the press or answers to press inquiries. I think that is a very debatable issue of fact here. I think the allegation—the categorical denial that information was fed to the press presents a very substantial issue of fact here.

[fol. 435] I think that the issue raised by the statement that there was no evidence tendered to the press which was not introduced at the trial presents an issue of fact which, on the record before your Honor, has to be resolved against the prosecutor because on his submission and as presented in our petition there were statements made concerning these petitioners which were not made the subject of proof at the trial.

And, finally, the claim made and repeated in the United States Attorney's answering affidavit in the Rosenberg case that all the facts alleged in the moving petition were known to the defendant and his counsel at and prior to the trial—I think that presents a very serious question of fact, and you have our reply affidavits with respect to them.

I think that the basic position which Mr. Bloch took is one in which I join, that when you have a proceeding which is the result of the direct participation of the United States Attorney, you have something which has been characterized by Justices Frankfurter and Jackson in the Shepard case as "one of the worst menaces to American justice," and I say that when a prosecutor has participated in and fostered the bringing about a situation which is comparable to one of the worst menaces to American justice, that you have a violation of due process which can be raised at any time,

[fol. 436] and as Section 2255 itself provides, the objection there referred to can be raised at any time.

I think that the question as to the significance of the failure to raise the question before the trial has no bearing on several other points raised in the Sobell petition, and in general it may be itself an appropriate subject for the hearing which we are requesting.

[fol. 437] Now, your Honor, there is one final matter that I want to address myself to. While I was preparing the application for the relief sought here, my client, Sobell, was being held in New York at the Federal House of Detention on West Street. I consulted with him from time to time during the preparation of his papers in the Supreme Court of the United States and during the advanced part of the preparation of the papers on this application. By virtue of the denial of the Supreme Court of the petition for rehearing, the mandate of the Circuit Court of Appeals which had been stayed until a week ago Wednesday came down to the District Court, and so the Attorney General became free to transfer Sobell to a Federal prison outside of New York.

I made application to Judge Weinfeld for a stay of that transfer so that I could consult with him prior to the preparation of this petition, and over the objections of the United States Attorney a temporary stay was granted, which expired last Tuesday. Now, in my final papers on this application I renewed the request that Sobell be retained in New York for the purpose of further consultation concerning this petition and for the purpose of having him available to discuss the factual matters raised by the petition. Judge Weinfeld felt that this was a matter [fol. 438] which had to be decided by the judge who finally was to pass upon the merits of the petition itself.

I want to call your Honor's attention to the opinion which Judge Weinfeld handed down.

The Court: I have read it. You mean the opinion which is annexed to one of the orders to show cause? Yes, I read it. I read the concluding paragraph. I am familiar with it.

Mr. Meyer: That respectful suggestion was disregarded. Mr. Sobell was transferred the morning after that opinion was written to Alcatraz Penitentiary in California.

The Court: That is an administrative matter that I am not going to interfere with.

Mr. Meyer: I am not asking your Honor to interfere with it as an administrative matter, but as an act of judicial prerogative under the section of the Judicial Code held by Amen to be auxiliary to Section 2255. I ask your Honor to cause him to be returned to this jurisdiction. As a practical matter, an impediment has been created for his representation, and I will give you an example. I sent an affidavit to him a week ago last Wednesday by airmail special delivery with an air mail return envelope. I have received [fol. 439] no response yet. It seems to me that adequate representation of this defendant at this hearing requires that I be able to present such a statement to him, obtain his comment about it, and determine whether or not an affidavit should be submitted with respect to it. I ask that your Honor consider this renewed application in the light of the proposition that it should be considered not as an application to bring the man back from Alcatraz, but as an application to keep him here, and I consider it a most premature and arbitrary act to have him sent out there on the very day that this petition was being presented to a court and when a court could have then passed on whether or not it was possible for him to continue to consult with me and be available until this matter is decided.

The Court: I can't say as a matter of law that it was capricious or arbitrary for those who are in charge of that matter to have transferred this man when they did. At least, from the time of sentence, April 5, 1951, he has been around and available. If your application is now for an order directing the Attorney General to produce this man or to have him transferred to the area of New York, it is at this time denied. You may renew your application later on if on a showing it is necessary to take testimony of this [fol. 440] man. At this time I hold it is not necessary to take any testimony from him. I think you have had ample opportunity to secure such affidavits from him as might be desirable, as you might deem necessary or desirable.

Mr. Meyer: That opportunity must be qualified to the extent that this matter is one involving a branch of the law with which most attorneys are not familiar.

The Court: I think that the scope of the application that can be made under Section 2255 has been well defined by opinions in this and other Circuits, as well as by Supreme Court decision in the Amen case, which was handed down in January 1952, almost a year ago. You have a number of decisions in this Circuit, as well as in other Circuits. I think this section is not a new section. Your application at this time is denied.

Mr. Meyer: I don't believe it is necessary for me to note an exception to that.

The Court: No, the law gives you an exception.

The Court: Mr. Kilsheimer, are you ready now?

Mr. Kilsheimer: Yes, I am ready.

The Court: All right. Go ahead.

Mr. Bloch: Your Honor, I promised to call some-[fol. 441] body.

The Court: Suppose we take a five-minute recess. I was going to adjourn at 5 o'clock. I was going to give you an opportunity for a short reply on Friday after your papers have been submitted, Friday at 2 o'clock. We can conclude the hearings then.

(Short recess.)

The Court: You may proceed.

Mr. Kilsheimer: May it please the Court, as Mr. Bloch outlined, the present motion grounds, three principal grounds of attack on the judgment of conviction and sentence entered in this case. I should like to address myself briefly to each one of the grounds of attack urged in the papers, the first one of which is that the newspaper publicity pretrial was such as to create a hostile atmosphere so that an impartial trial jury could not be obtained in order to try the defendants.

As the answering affidavits point out and as we argue in the memorandum of law which I have submitted, it is our contention that this argument at this time is frivolous, without merit, and no ground for attack upon the judgments of conviction under Section 2255.

[fol. 442] In the first place, a reference needs to be made to the newspaper articles that are attached as exhibits to the moving papers. A perusal of those papers indicates

that an attack is being leveled at the judgment and conviction against these defendants based upon newspaper articles in no way relating to the case against the defendants. Indeed, many of the articles refer to such matters as preparations for civil defense; many of them refer to cases of defendants and trials of defendants in no way connected with the trial of this case, such as the case of prejury against William Remington, and the matter of Drothman and Moscowitz.

When we review the newspaper publicity which is contained in the papers concerning this very prosecution, it is apparent that the great bulk of the publicity occurred at or about the time of the apprehension of these defendants, in the summer of 1950. The trial did not commence, as your Honor knows, until March of 1951. It is significant to note from the chart annexed to the moving petition of the Rosenbergs, entitled "Quantitative Reportage," concerning the Rosenberg-Sobell case from sometime around the 10th of December 1950, up to approximately a week prior to the trial, there is no indication of any reportage in the news-[fol. 443] papers concerning this case whatsoever. Then from some time around the 23rd of August up until December, there is very sporadic and negligible publicity concerning this case and concerning these defendants. This can hardly be the type of prosecution inspiring prejudice that is alleged in the papers as a ground for attack upon the judgment.

But going further, I submit, your Honor, that if the atmosphere in the community was such as to be hostile, it must have been known to the defendants and to defense counsel, who were part of the community allegedly influenced by this hostile publicity, and I think one of the best answers is contained in the reply affidavit of Mr. Bloch which was submitted today in connection with these motions. On page 3 of the affidavit Mr. Bloch states:

"This complete picture was unavailable to me from the date of my retainer up to and through the petitioners' trial. Nor could the entire panorama have been revealed to me by the usual sporadic reading of an average newspaper reader in New York City."

I submit, your Honor, that the jury in this case would

fall within a similar classification of average newspaper reader, and if counsel for the defendants charged with the [fol. 444] defense of the rights of the defendants was not influenced as an average reader, I think, then, that the average public from which the jury was selected was not so influenced.

Concerning the law as I see it, the existence of a hostile atmosphere in the press created by press releases whether instigated by the prosecution or whether it occurred through the normal reporter coverage of cases involving national interest would, at most entitle these defendants to a continuance of the trial. We must remember that under the Constitution these defendants, as all defendants charged with crime, are entitled to a speedy trial. If we delayed the trial indefinitely until the atmosphere was such that it was to everybody's liking, the defendants might very well urge the prosecution violated their constitutional right to a speedy trial and, therefore, attacked the judgment on that ground.

The Court: My recollection has been refreshed, I think, here. Am I correct in recalling, Mr. Kuntz, when I sat in September 1950, after the arrest of these defendants that an application was made for reduction of bail, and accompanying that application there was an application made on [fol. 445] behalf of at least one defendant, Sobell, for a speedy and prompt trial in the event that bail was not reduced?

Mr. Kuntz: Your Honor, I don't recall any such application. I think the record will bear me out that the first time we were mentioned in any indictment at all was the middle of October.

The Court: It may have been October. There was a statement made, I don't know whether by you or by somebody else——

Mr. Kuntz: Harry Phillips was my co-counsel.

The Court: —for immediate trial in the event that bail was not reduced.

Mr. Kuntz: We could not possibly have done that.

The Court: I may be in error.

Mr. Kuntz: When we pleaded, at that time we asked for reduction of bail, but we have many steps to go through,

and that did not take place for some time, quite a long while. So I don't think we made any such application.

The Court: I am not sure. Of course, I accept your statement as to the facts.

Mr. Kuntz: It may be that the Government said they were ready to proceed to immediate trial and that is why bail should not be reduced.

Mr. Kilsheimer: In this connection, one of the exhibits [fol. 446] submitted by defense on this motion purports to quote Mr. Bloch, who was trial counsel for the Rosenbergs, or for Julius Rosenberg, as demanding a speedy trial of the issues in the case.

The Court: When was that request made?

Mr. Kilsheimer: It was some time shortly after the arrest, your Honor. I don't offhand recall the specific date. It is Defendants' Exhibit 7-G-2. I will dig it out of the pile of exhibits to call your Honor's attention to it.

Mr. Bloch: If I may say to the Court, I di- make such a request, and if the Government asks me to produce my records or asks my statement about it, I would be very willing to give it in open court.

The Court: What was the date?

Mr. Bloch: It was right after the arrest, and I thought a speedy trial was necessary. I knew nothing about the totality on this pretrial publicity.

Mr. Kilsheimer: Now, moving on from that argument, I think that the argument now made for the first time that the trial jury, in effect, acted as a rubber stamp to agree with the pre-conceived notions of guilt which they had had from reading newspaper publicity is clearly belied by the record. I think the Court of Appeals in affirming the con- [fol. 447] victions in this case has had occasion to point out that counsel's conduct and statements at the trial did not comport with the charges that he made after the trial and after the jury's verdict. I want to point out to your Honor a statement made by one of counsel in this case to the jury after they had rendered a verdict of guilt. It is referred to on page 4 of Mr. Lane's affidavit, to the effect that:

> ". . . a lawyer does not always win a case; all that a lawyer expects is a jury to decide the case on the evidence with mature deliberation. I feel satisfied by reason of the length of time that you took for your

deliberations, as well as the questions asked during the course of your deliberations is that you examined very carefully the evidence and came to a certain conclusion."

That certainly is an indication of counsel's opinion of the jury at that time. They had very carefully examined the evidence. I want to point out to your Honor that the jury took considerable time to deliberate on this case. They received the case at approximately ten minutes to five on one afternoon and they deliberated that evening and they were sent to a hotel, and they did not return their verdict [fol. 448] until approximately 11 o'clock the next morning, showing that the jury did take considerable time to view the evidence and to arrive at its verdict.

With respect to the Perl incident, to which much reference has been made here, I think that falls squarely within the ruling of the Court of Appeals in the case of United States vs. Weber, that is, the Court of Appeals for this Circuit. In the Weber case after the impaneling of the jury there appeared in the press certain adverse publicity about the defendant, calling attention to his prior criminal record and also, as the Court of Appeals characterized it, a scandalous cartoon, referring to the defendant. A motion for a mistrial was made. The motion was denied and the trial judge gave appropriate precautionary instructions to the jury. The Court of Appeals affirmed and stated that the only remedy, and those words "only remedy" are in the opinion of the Court of Appeals, the only remedy available to the trial court was either to caution the jury not to be influenced by anything seen in the newspapers, or to declare a mistrial.

In this case, whether the indictment of Perl was timed, [fol. 449] as the defendants charge, or whether it came about in the normal course of the administration of justice, I think is immaterial on a motion of this kind. The fact remains that there was certain publicity concerning the Perl indictment. Whether that publicity was accurate or inaccurate, the publicity took place. We do not dispute that fact. Both counsel stated they were aware of the publicity at the time it occurred. Yet they saw fit not to ask the trial judge to give instructions to the jury and/or for a mistrial.

Under those circumstances, I certainly think that having chosen the method that they would proceed by in the trial court, they cannot now be heard to say that there was something wrong.

I further think that anything that occurred in the Perl case subsequent to the conviction of these defendants is absolutely immaterial upon this motion. The only possible influence the Perl indictment could have had upon this conviction might have been the publicity consequent to the indictment, arrest and arraignment of Perl, which occurred during the trial of these defendants. That was the sole bearing of that case on this. Not having raised the point, although they were both aware of it, I think precludes them now from urging any error in the trial court upon this point.

[fol. 450] I think the cases in my memorandum of law show that counsel cannot choose one tactic at the trial and upon receiving an adverse verdict attempt to claim that that tactic was wrong and that they should have followed another tactic, which they might follow if another trial were granted, and so on.

With respect to the issues that can be raised under Section 2255, it is not every issue as to the conduct of the trial which can be raised. Indeed, errors of law which occur at the trial and which were available to the defendants upon appeal cannot be raised. The newspaper publicity, I think, falls squarely within the ruling of those cases which are cited in my memorandum. I think also the point of Sobell as to the evidence which he characterized as a general intent or general treachery or intent to betray was, likewise, if at all, an error of the trial court in the admission of the evidence. It was available to the defendant to urge at the trial. He was represented by competent counsel. It was available to the defendant to raise upon appeal. He had competent counsel upon appeal. There is no showing that this is something which was not available to the defendant and, therefore, it should have or could have been raised in [fol. 451] the trial court and upon appeal. Under those circumstances they are precluded from raising it under Section 2255.

I think a case which is in point upon this which is not cited in my memorandum is Carvel v. United States in

173 Fed. (2d) at page 48, in which there was a complaint raised under Section 2255 that defense witnesses were not summoned at the trial. The complaint was dismissed under the 2255 motion because it appeared that no complaint on that score was made at the trial and that the defendant was not precluded from raising the point.

Moving now to the second ground of attack, that is, the prosecution knowingly used purjured testimony to bring about the conviction, the first attack is made upon the testimony of David Greenglass to the effect that he cooperated with the authorities from the very first time that he was brought in. The only alleged contradiction of that statement is one statement made by the United States Attorney at the time of the sentence of David Greenglass to the effect that upon the arraignment of David Greenglass his counsel, Mr. Rogge, made certain protestations of innocence, and it was not until later that there was cooperation by both David Greenglass and Ruth Greenglass. There is [fol. 452] certainly on the face of it no contradiction of Greenglass's sworn testimony to the effect that he himself had cooperated from the first time that he came in. There is further submitted here the affidavits of two agents of the Federal Bureau of Investigation, which are uncontradicted upon this motion, to the effect that Greenglass did cooperate. Counsel suggested that we call as a witness Mr. Rogge. We say it is not at this time timely. He was available and in the courtroom during the trial. Mr. Rogge's secretary was in the courtroom at the trial. If there was anything to raise, it should have been raised in the trial court.

Greenglass's credibility was certainly contended by the defendants. It was presented to the jury and the jury resolved the point. With regard to the ability of Greenglass to draw the sketches which he says that he drew from memory, that again was an issue as to Greenglass's credibility which was very seriously submitted to the jury by the trial judge and passed upon by them. The experts or so-called experts whose affidavits are submitted upon this application, I submit, add nothing to the case. As a matter of fact, just looking over the qualifications of the experts, most of them do not show any knowledge as to nuclear [fol. 453] physics or any connection with atomic energy

research at all. Mr. Hadamard shows nothing in his affidavit as to nuclear physics. Mr. Bernal shows nothing about nuclear physics, and both of them say it was not impossible for Greenglass to reproduce the sketches, but merely improbable. Again, the affidavit of Mr. Kaiser was referred to by your Honor. He shows that he is a radar expert and has no connection or had no connection with nuclear physics until, at least, 1947. As to the affidavit of Mr. Crowther, he says in his opinion it would have been impossible for Greenglass to reproduce the sketches, and, yet, there is no showing that he is a scientist at all. The affidavit shows that he is a scientific writer for some newspaper and that his knowledge generally is gained from interviews with scientists as to what they could retain in their memory. That is no basis for attack upon the credibility of a witness under Section 2255.

With regard to the Schneider testimony, we really get down to trivial things. The question is, at best, ambiguous. I think that is borne out by the question and answer on cross-examination wherein Mr. Bloch asked him, Was that the last time before you saw him in the courtroom? I think clearly in the context in which the question was asked it was [fol. 454] intended to mean, had you seen the defendant Rosenberg subsequent to the time when you took his photographs and prior to this trial, and I think that is borne out by the cross-examination. As to the charge that there was fabrication, the affidavit of the agent who first met Mr. Schneider, the first Government agent to meet with Mr. Schneider establishes that an identification was effected at that time, and upon his very first interview at his shop at 99 Park Row, thus disposing of any contention as to a fabricated identification.

With regard to the last point made by the defendants on this motion to the effect that the information that was given away was not a secret at all, but was really public information, I think that has been clearly disposed of by the trial court. The trial judge submitted to the jury very specifically the question as to whether or not this information was secret. The jury having resolved that question in favor of the defendant, I think that it is not properly raised on this motion.

One of the elements that the trial judge submitted to the

jury was that very matter, and this is in the trial judge's charge at page 1554 of the printed record. The trial judge [fol. 455] had previously defined the nature of information that would come within the interdiction of the statute as relating to the National Defense. The trial jury having taken care of that, I think that is not properly raised here. Futhermore, the point as to whether the information was classified and was secret was specifically conceded at the trial. Counsel stated that he did not intend to dispute that everything connected with the Los Alamos project was a secret and classified and that all information relating thereto, including the names of the scientists who were working there, was classified information. Attack is now made upon the information relating to the Atomic Bomb which was transferred and there was further evidence which indicated that information was transmitted relating to the names of scientists who were working at the project, relating to the physical layout of the project, relating to the security regulations which were enforced there. There is no attack at this time that that information was not classified and was not properly classified. Therefore, I think that this point gets down to no more than a quibble. The point was conceded by counsel. It was passed upon by the jury, and he is now foreclosed from saying that that infor- [fol. 456] mation was not classified. At best, this might become under certain circumstances newly discovered evidence which might have been urged under a motion for a new trial. This is not such a motion. I call your Honor's attention that this is a collateral attack based upon jurisdictional grounds, based upon the judgment and conviction with the application that it be set aside. There is no request for relief for a new trial here. Further, there is no showing that this information is either newly discovered or could not have been known at the time of the trial with the exercise of due diligence. I think in summary, your Honor, that this motion is no more than a maneuver to forestall the execution of sentence imposed 18 months ago. This is merely an attempt to perpetuate the myth of innocence of these defendants. Whether or not they were innocent was passed upon by the jury and has been affirmed in all the appellate courts. For that reason I ask that the motions be denied in all respects and no hearing be granted.

The Court: Do you gentlemen want to be heard now in reply? Or would you prefer to leave it wait until Friday? I will give you until Friday noontime to submit any additional affidavits that you desire.

Mr. Bloch: I did not hear anything that Mr. Kilsheimer [fol. 457] stated to the Court today that he has not incorporated in his memorandum. I am not disposed to reply at all. I think I would merely cover the same ground that I have covered. If I have not made my points clear by now, it is too bad for me.

Mr. Meyer: In view of the fact that Mr. Kilsheimer did not address himself to the separate points raised in the Sobell petition that I argued I would be adding to my main argument. There is nothing to reply.

The Court: I expect, Mr. Kilsheimer, that you will submit a reply memorandum with respect to the treason proposition.

Mr. Kilsheimer: I think it is in point one.

The Court: You look it over and if you want to submit a reply memorandum on that point, have it in by Friday at 12 o'clock.

Mr. Bloch: Just one statement modifying what I said before, in connection with the last point. Mr. Kilsheimer spoke concerning the secrecy of some of this material. At the trial I conceded that the Government classified this material as secret. I now raise the contention that that classification was arbitrary.

The Court: Whether or not it was arbitrary, did you introduce any evidence to show that it was not, in fact, [fol. 458] secret information?

Mr. Bloch: I did not.

The Court: The Judge left it to the trial jury to determine.

Mr. Bloch: I have that evidence here and I expect to introduce it at a hearing, if the Court permits me.

The Court: I would not hold a hearing on that at all.

Mr. Bloch: I said, if the Court permits me.

The Court: At the present time, gentlemen, I don't see any need for taking any oral testimony. If after examination of your affidavits that you submit, if you do submit any by Friday at noontime, I determine that it becomes necessary to take oral testimony, I will notify you and set the

matter down for hearing. Otherwise, I will deem the matter submitted to me with the submission of your papers. I will try to give you a decision as soon as I can.

Mr. Bloch: If your Honor pleases, there are just two thoughts that I have. The first is that in the event that I am unable to procure the affidavits about which we discussed and which you gave me leave to submit by Friday, I would like the record to show that even though I don't return here Friday in open court I shall be deemed to have [fol. 459] made and renewed my offers of proof.

The Court: Your offers of proof are made and stand.

Mr. Bloch: Now, the second thought that I have is the following: Despite Mr. Kilsheimer's characterization of this application as a maneuver to delay the execution of sentence, which, of course, I categorically deny, I am concerned about time.

The Court: I will try, gentlemen, to do this on Saturday.

Mr. Bloch: I don't want to overburden the Court.

The Court: In addition to this, I am conducting my usual trial part. You have handed me a wealth of material. I have been reading the last several nights and over the weekend. I have read most of it and am familiar with most of it. I have yet to examine the record on appeal and I have yet to examine those newspaper articles. I am not going to read that in minute detail, but I want to familiarize myself with them and get a general idea of the trend of publicity and the type of publicity and the extent and the form that it took. I will do that because of the seriousness of the issue involved here and the impending consequences [fol. 460] to the defendant. I will try to give you a decision next Monday. If I can't give it to you next Monday, it will be soon thereafter.

Mr. Bloch: We did not bring this application to overburden the Court, but if the Court feels that it needs time, I think in this kind of a serious matter it ought to have all the time it desires. In that event I want the Court to consider the application I made the other day, which I am renewing now and which I consider to be a continuing one, namely, if the Court feels that it will take a lot of time to decide this, that a stay be granted.

The Court: At this time an application for a stay and the execution of judgment is denied.

Mr. Bloch: I just don't know how to proceed in the event that the Court feels that it might take a week or ten days to deliberate.

The Court: I expect that I will have my decision next Monday.

Mr. Bloch: All right. Thank you.

The Court: (Continuing) With the help of the Lord. Thank you, gentlemen, for your cooperation.

[fol. 461] UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG and MORTON SOBELL

Stenographic Minutes

New York,
December 5, 1952;
2:15 o'clock, p.m.

Hearing Resumed

Present: Mr. Kilsheimer, Mr. Bloch, and Mr. Myer.

Mr. Kilsheimer: I am sorry, your Honor, if I have delayed you.

The Court: No. We are convening for the purpose of completing the record.

Mr. Kilsheimer: Yes, your Honor.

The Court: You may proceed, Mr. Bloch.

Mr. Bloch: Your Honor, I have merely two or three requests to make. Although your Honor gave me merely until noon to file supplementary affidavits, I have received within the last hour two of them, and I am asking for leave to file them.

The Court: All right.

Mr. Bloch: I have not served the District Attorney yet, but I am going to serve him now.

The Court: You can give them to him at this time.

[fol. 462] Mr. Bloch: Yes. One is an affidavit of Gertrude M. Evans, and the other is an affidavit of George Trow.

The next request I would like to make, your Honor, is to renew the offer of proof which I made at the commencement of the argument, which I renewed some time during the argument or at the end of my argument in view of my supplementary affidavit on my inability to procure without the use of the subpoena power of this Court information which the Court indicated was relevant to the inquiry here.

Mr. Meyer: I would like respectfully to join in the last request made by Mr. Bloch.

The Court: My view at the time of the last hearing on Tuesday of this week was that there was no factual issue presented by the papers submitted on this application or these petitions which warranted or necessitated the taking of oral testimony. I have not, of course, examined the affidavits that you have submitted today. I intend to do so. If upon examination of the additional affidavits that you submitted today I determine that oral testimony should be taken or that the petitioners should be afforded an opportunity to present oral testimony, I will advise you of that not later than Monday morning. If I determine that no [fol. 463] oral testimony is necessary or no opportunity for the presentation of oral testimony is indicated by the papers which have been submitted, I will then proceed to determine the merits of the petition. I will try to do that as speedily as possible.

Mr. Bloch: My third and last statement or request, your Honor, is this: No matter what the Court's determination on this application may be, whether favorable to the petitioners or adverse to them, I would like to reserve for the record my right to make an application for a stay of the execution of judgment.

The Court: You always have the right to apply for a stay of execution of the judgment without making any reservation of that right. If it becomes necessary and I have jurisdiction, I will hear any such application when the occasion arises, if it should arise. That is the same with reference to your defendant, too, Mr. Sobell.

Mr. Meyer: Your Honor, I want to address myself to that very briefly. At the conclusion of the oral argument on Tuesday I renewed the request that was contained in the petition and in the papers on the order to show cause for the transfer of Sobell back to New York from Alcatraz

Penitentiary. I wanted to be clear on the record—I only had a quick glance at the record, and it appeared somewhat [fol. 464] garbled—I want to make it clear on the record that in addition to the matters which I felt either as a matter of right or as a matter of discretion warranted his being brought back here, I want to make it clear that I have not had an opportunity to consult or confer with him concerning the matters in the answering affidavits of the United States Attorney, with which I was served on Monday afternoon.

The Court: I see no reason why the Court should at this time make any order directing the physical production of the defendant Sobell in court or directing his transfer from where he is now confined to a place of confinement within this district.

Mr. Meyer: It is the latter that I was addressing myself to.

The Court: I see no indication for making such order in view of the circumstances of the case.

All right, then, gentlemen, the matter is now submitted to the Court.

[fol. 465] UNITED STATES OF AMERICA

vs.

JULIUS ROSENBERG and ETHEL ROSENBERG and MORTON SOBELL

Stenographic Minutes

New York, December 10, 1952;
11:30 o'clock a. m.

Resumed.

Present: Mr. Kilsheimer III, Mr. Bloch, Mr. Meyer.

NOTE RE FILING OF OPINION

The Court: Gentlemen, I have prepared and I am ready to file my opinion in connection with the petitions filed by you on behalf of the defendants Julius and Ethel Rosenberg and Morton Sobell for relief under Section 2255 of Title 18 of the United States Code.

I find no relevant or material issue of fact raised by the petitions, which requires a hearing thereon or which render the taking of oral testimony either necessary or helpful. I have concluded, after affording the attorneys for petitioners full opportunity to argue the legal problems presented by the petitions and to make proffers of proof, that the petitioners are entitled to no relief, that the Court which [fol. 466] rendered judgment had jurisdiction, that the sentences imposed were authorized by law and are not otherwise open to collateral attack on any of the grounds urged by the petitioners, and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed.

The petitions are denied; the files and records of this case and the papers and exhibits now submitted conclusively show that the petitioners are entitled to no relief. Since I find no substantial question of law raised by these proceedings, the application made on behalf of the petitioners Rosenberg for a stay of execution of the judgment pronounced against them is denied.

I will file now with the clerk my opinion, and Miss Pichel will give counsel for the defendants and the United States Attorney a copy of the opinion. I will appreciate it if you will return it after it has served its purpose.

Mr. Bloch: Are you entering a formal order?

The Court: No, an order may be prepared within the next ten minutes.

Mr. Kilsheimer: May we have until twelve o'clock? I will prepare an order and submit it.

[fol. 467] The Court: Come back here when it is convenient for all of you. In the meantime you can read the opinion that I filed. I will sign the order and give it to the clerk to be filed herewith. I think there should be a separate order prepared in each case, a separate order for the Rosenberg case and a separate order as to the petitioner Sobell, because I think the matter was brought on by two separate petitions.

Mr. Kilsheimer: I will do it that way.

Mr. Bloch: May I go off the record?

The Court: No.

Mr. Bloch: Then, if the Court please, I would like you to

postpone this matter until 2:30 this afternoon to enable me to study your opinion and to submit any proposed order or counter-order that I may deem expedient under the circumstances. At that time I may desire to make further applications before the Court.

The Court: It would be better if you make it at two o'clock. I have another case I am trying here.

Would two o'clock be convenient? If it will not, we will make it 2:30.

All right, 2:30.

Mr. Bloch: Thank you very much.

Mr. Meyer: Thank you.

(Adjourned to 2:30 p.m., this date.)

[fol. 468] (Session at 2:30 p.m.)

(Same appearances.)

The Court: Are you ready?

Mr. Kolscheimer: Your Honor, I have prepared and submit proposed orders, one order covering the two Rosenbergs, and the second order on the case of the defendant Sobell. For the sake of accuracy, Mr. Bloch points out to me that I put in April 6th, instead of April 5th, as to the date of judgment. That should be April 5th, 1951, your Honor.

The Court: Have you submitted copies of these orders to counsel for the defendants?

Mr. Kilsheimer: I have to each counsel.

The Court: Have you examined the order proposed now in the matter of the petitioners Rosenberg?

Mr. Bloch: I have, your Honor.

The Court: Are there any suggestions or objections to the form of the order, not to the substance?

Mr. Bloch: There is just one word there, "conclusively show." I don't gather that conclusion follows from your opinion. I was just wondering whether the order would not be just as effective from the standpoint of the United States Government if it did not have that word "conclusively".

The Court: I found conclusively. That is the language of [fol. 469] the statute. I specifically set forth in the opinion that I filed that there was a conclusive showing that the petitioners were entitled to no relief.

Have you any objections as to the form of this?

Mr. Bloch: Not as to the form.

The Court: As to the substance, of course, you do object?

Mr. Bloch: That is correct, of course. There is just one point. I suppose there is a slightly different practice in the federal court from the State courts. Not all the affidavits are enumerated in support of the application or in opposition to the application. What is the practice?

The Court: There are two schools of thought on that matter in the federal court. One very distinguished now retired Judge of the Court of Appeals feels that all these recitals are a lot of nonsense, and I often feel that they are myself. However, it has been done for so many years, I hesitate to depart from the precedent which has been honored, at least by time and by observance. We will put them in as they are and I will sign the order changing only the date of judgment to April 5th.

Mr. Meyer: With reference to the question that Mr. Bloch has raised, I see there are certain omissions, but in view of [fol. 470] my understanding as to the federal practice, we are not precluded from showing what they were.

The Court: If a dispute should arise at any time as to the papers and documents before the Court at the time that these petitioners were determined, or if it should become necessary to prepare any documents on appeal, you may send the papers on appeal before me and I will resolve any dispute.

Mr. Kilsheimer: The reason they are not all set forth, in the papers submitted by Mr. Meyer on behalf of Sobell he made reference in his own affidavit to certain affidavits submitted on behalf of the petitioners Rosenberg.

The Court: Although two separate petitions were filed here, I considered all these papers and documents submitted on each petition in connection with the consideration of the other petition. So that when I determined the merits of Sobell's petition, I considered all the papers and documents which had been submitted by the petitioners Rosenberg; and, likewise, in connection with my consideration of the petition of the defendants Rosenberg, I considered all the papers submitted by Sobell. I don't think there is any question about that. I think I might have mentioned that in my

opinion. If not, I think you will find some mention of it in [fol. 471] the minutes.

Mr. Meyer: I have no doubt about that, your Honor. I just wanted to address myself to the fact that there were also affidavits on November 21st and 22nd on my application for a stay. But I don't think it is worth bothering with this question on this order at this time.

The Court: I will sign the order as submitted and I will give it to the clerk to be filed immediately.

Do you gentlemen wish to make any further application to the Court?

MOTION FOR STAY AND DENIAL THEREOF

Mr. Bloch: I do. I would like to make application on behalf of the petitioners-defendants Julius Rosenberg and Ethel Rosenberg for a stay of the execution of the separate judgments of conviction against them dated April 5, 1951, as supplemented by the order of Judge Kaufman dated November 21, 1952, pending an appeal from your determination denying the petitioners' application under Section 2255. I submit, your Honor, that even from the premises of your Honor's opinion there are serious questions of law involved. The execution date, as you know, is set for the week commencing January 12th, and unless a stay is granted pending the appeal, which I now represent to you will be filed this afternoon, the entire appellate proceeding will be rendered [fol. 472] sterile and academic.

The Court: I see no substantial question of law presented by the petitions filed on behalf of the defendants Rosenberg, and I, therefore, deny the application for a stay of execution pending appeal.

Mr. Bloch: I respectfully except.

The Court: In fact, I considered this question very carefully, Mr. Bloch, at the time I rendered my decision, and I think you will find mention of it in the closing part of the opinion that I filed this morning. I gave it very serious thought, because you had mentioned it or appeared to have mentioned it in the papers which were submitted to me. I think you had mentioned it.

Mr. Bloch: Yes.

The Court: I gave that serious thought, and I find no

substantial question of law involved in either of these petitions.

Mr. Bloch: In order to expedite my appeal and complete the record, your Honor, I have prepared an order for your signature denying my application for a stay of execution pending the appeal.

The Court: I think what you better do so that there can be no question as to regularity—I suggest this; I don't direct it—I suggest you serve it forthwith on the United States Attorney, and having done that, I will then be in [fol. 473] position to pass upon your application for a stay pending appeal. I indicated to you that I will deny it.

Mr. Bloch: The reason I made it now before I filed my notice of appeal, is that I was a little concerned that you might be deprived of jurisdiction once the notice of appeal was filed.

The Court: I am not deprived of jurisdiction for the purpose of obtaining a stay of execution pending appeal. The rule is, as I understand it, that the application must be made to the district judge before it will be entertained by the Court of Appeals. However, you have made it before the notice of appeal. You may make it again after the notice of appeal, and in that way you will be sure that your clients' rights are amply protected.

Mr. Bloch: Since some time will elapse from the time I serve Mr. Kilsheimer on behalf of the Government and file my notice of appeal in the clerk's office, and our coming back here, perhaps an arrangement ought to be made for some specific time.

The Court: You come right in here, say, at three o'clock. That should be plenty of time. Or come in before that time.

Mr. Kilsheimer: If Mr. Bloch would serve me now, per- [fol. 474] haps the notice of appeal could be filed with Mr. Schaefer with these orders with the clerk's office.

The Court: It might save time. You might give him your notice of appeal now.

Mr. Bloch: I will also serve Mr. Kilsheimer with a copy of the proposed order which I intend to submit.

The Court: You submit the order now. Have you already served him with a notice of appeal?

Mr. Bloch: I have.

The Court: File it with the clerk. I see no objection to the form of this order.

Mr. Kilsheimer: I have not seen the order yet.

The Court: I suggest you look at it.

Mr. Kilsheimer: The only comment is that he has my father's name on the front page, and not mine.

The Court: You are the third in order of succession.

Mr. Kilsheimer: Yes.

Mr. Bloch: I forgot about that.

The Court: I simply have one notation that I am going to add here:

> "The Court having found that such an appeal presents no substantial question of law",

which I take it to be a necessary finding on my part before [fol. 475] I can deny this application at this time.

Mr. Kilsheimer: Is your Honor inserting that at the end of the recital?

The Court: Just before the words "it is." With*at* that I sign the order denying the application for a stay of execution pending appeal.

Mr. Meyer: May I have a word, if your Honor please?

The Court: Yes.

Mr. Meyer: I think it is in the interests of the sound administration and orderly administration of justice that these two appeals should be heard together, even though I don't have the same type of problem,

The Court: I don't think I have the power of consolidating appeals. I think such an application has to be made to the Court of Appeals.

Mr. Meyer: I want to make it a matter of record that I have already served my notice of appeal and filed it with the clerk, and I would like to renew my application to have Sobell brought back to New York for the purpose of consultation pending that appeal, as well as on all the other grounds mentioned to your Honor heretofore.

The Court: I see no reason for it. It does not seem to me that Sobell has any knowledge which necessitates consultation between him and his attorney either in connection with [fol. 476] the petition or an appeal from the decision and order I have made on the petition. You- application for an

order directing the return of Sobell from the place he is now incarcerated to this district is denied.

Mr. Bloch: I suppose that concludes these proceedings.

The Court: Yes.

Mr. Meyer: I apologize for the interruption, your Honor.

The Court: You don't have to apologize. You are here protecting your client's rights. I have no further jurisdiction in the matter now.

[fol. 477] In United States District Court

[Title omitted]

Stipulation as to Record and Exhibits—Dec. 19, 1952

The appellants herein and their counsel have represented and hereby represent to the appellee:

(1) That the within record contains all matters necessary fairly to present their points and such points as are relevant in reply.

(2) That insofar as the transcript of record purports to contain the stenographic minutes of the proceedings, the matters are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.

(3) That all exhibits are incorporated in the record except Exhibits II to XV and A and B now on file with the Clerk of the United States District Court for the Southern District of New York, which may be submitted to the Appellate Court upon argument of the appeal.

(4) That the within record contains all matters required [fol. 478] to be set forth by applicable rules.

In reliance upon these representations it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, are deemed a part hereof, and, may be submitted to the Court upon the argument of the appeal, with the same force and effect as if reproduced herein and, further, if it should

appear to the appellee that matter properly a part of the within record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellants to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

Dated: New York, N. Y., December 19, 1952.

Emanuel Bloch, Attorney for Appellants, Julius Rosenberg and Ethel Rosenberg. Howard N. Meyer, Attorney for Appellant, Morton Sobell. Myles J. Lane, United States Attorney. JBK.

[fol. 479] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 480] In United States Court of Appeals

For the Second Circuit, October Term, 1952

Nos. 162-163

Argued December 22, 1952

Docket Nos. 22570-22571

United States,

v.

Rosenberg, *et al.*

Opinion—December 31, 1952

Before: Swan, Chief Judge, and Chase and Frank, Circuit Judges.

Consolidated appeal from orders dismissing petitions under 28 U.S.C.A. § 2255, Ryan, Judge. Affirmed.

Emanuel Bloch, Attorney for appellants Julius Rosenberg and Ethel Rosenberg.

Howard N. Meyer, Harold M. Phillips and Edward Kuntz, Attorneys for appellant Morton Sobell.

Myles J. Lane, United States Attorney for appellee; James B. Kilsheimer, III, of counsel.

[fol. 481] Swan, Chief Judge:

The appellants were convicted of conspiracy to violate the Espionage Act.[1] They were sentenced on April 5, 1951. Their conviction was affirmed by this court,[2] and thereafter petitions for certiorari and for rehearing were denied by the Supreme Court. The present appeals are from orders dismissing petitions under 28 U. S. C. A. § 2255 by which the petitioners sought release from custody upon the ground that their sentences were imposed in violation of the Constitution or laws of the United States. Under this section the court must grant a prompt hearing, determine the issues and make findings of fact and conclusions of law with respect thereto, "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." After hearing oral argument of counsel for petitioners and of the United States Attorney, Judge Ryan ruled that it was conclusively shown that the petitioners were entitled to no relief and that no material issue of fact was raised which required a "hearing." He wrote an able, careful and comprehensive opinion, familiarity with which will be assumed without repeating herein his discussion of the points considered.

The remedy afforded by this statutory proceeding is analogous to that afforded by a writ of habeas corpus. *United States* v. *Hayman*, 342 U. S. 205. It, like that writ, "cannot ordinarily be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to Constitutional rights." *United States* v. *Walker*, 2 Cir., 197 F. (2d) 287, 288; *Adams* v. *United States, ex rel. McCann*, 317 U. S. 269, 274. Nor can it be used to obtain a retrial according to procedure which the petitioner volun-
[fol. 482] tarily discarded and waived at the trial upon which he was convicted. *Adams* v. *United States, ex rel.*

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[1] The Act as it now reads is 18 U.S.C.A. § 794.

[2] *United States* v. *Rosenberg*, 195 F. (2d) 583.

McCann, 317 U. S. 269, 281; *Carruthers* v. *Reed*, 8 Cir., 102 F. (2d) 933, 938; *United States* v. *Snyder*, 2 Cir., 160 F. (2d) 351, 353; *Bowen* v. *United States*, 5 Cir., 192 F. (2d) 515, 517; *Smith* v. *United States*, C. A. D. C., 187 F. (2d) 192, 198, cert. den. 341 U. S. 927. These limitations on the function of a petition under § 2255 must be borne in mind in considering the present appeals.

Since Judge Ryan held no hearing at which testimony could be presented, it is necessary to treat as true all facts stated in the petitions and in accompanying affidavits and exhibits, and to disregard all contrary statements of fact in the government's affidavits. This does not mean, however, that Judge Ryan was obliged to accept as facts conclusionary allegations asserted by the petitioners. See *United States* v. *Sturm*, 7 Cir., 180 F. (2d) 413, 414; *United States* v. *Pisciotta*, 2 Cir., —— F. (2d) —— (November 3, 1952). For example, the fact that newspapers carried the stories set out in the exhibits must be accepted, but the conclusion that such publicity made impossible the selection of an impartial jury is an inference which the judge is not necessarily bound to accept. If, so treating the allegations of fact, the petitioners would be entitled to relief on any particular item, we should remand as to that item for the taking of testimony and the making of findings of fact. With this preliminary statement as to the necessary approach to the problem we turn to the particular items upon which the petitioners relied as entitling them to relief.

1. Alleged prejudicial newspaper publicity. The first ground of attack upon their conviction asserted by the petitioners is that newspaper publicity before and during their trial, some of which was government inspired, was such as to bring about "a communal prejudgment of their guilt" [fol. 483] and thus deprive them of their Constitutional right to trial by an impartial jury. A great mass of newspaper clippings was submitted as exhibits attached to their petitions. They cover a period from February 1, 1950 to April 3, 1951. Nothing with specific reference to the petitioners appeared until about the time of their arrest. Julius Rosenberg was arrested July 17, Ethel Rosenberg August 11, and Morton Sobell August 18, 1950. The trial commenced March 6, 1951 and ended March 29th. There was

considerable newspaper comment when they were arrested. During September, October and November, newspaper references to the case were few and and brief. From November to February 21, 1951, there were no news items whatever concerning the pending prosecution. When a defendant believes that pretrial publicity has been such as to render impossible the selection of an impartial jury, there are well-recognized methods of raising this issue before the trial commences. He may move for a change of venue or for a continuance until the public clamor shall have subsided. The petitioners took neither of these courses. On the *voir dire* the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to the defendants, who did not even use all the peremptory challenges permitted them. Nor do they allege that any trial juror was in fact prejudiced by the publicity now asserted to have made a fair trial impossible.[3] Their present position is obviously an after-thought, inspired by the hope of securing a new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari. The excuse offered by counsel for the Rosenbergs is that he did not realize at the date of the trial the extent and the inflammatory character of the publicity as it could not have been revealed to him "by the [fol. 484] usual sporadic reading of an average newspaper reader," and he was so busy that he "read the newspapers" infrequently. But if he did not realize it, there is no reason to suppose that the jury was more seriously affected. Sobell's argument also urges that he and his counsel could not until the government rested its case have been aware of how detrimental the publicity regarding "atom spies" was. In essence this argument appears to be that the evidence at the trial showed that there were two conspiracies in only one of which was Sobell involved, a contention which was ruled against him on the prior appeal. Moreover, Sobell's petition alleges that the publicity concerning Julius Rosenberg "obviously rebounded to the prejudice of all defendants." If so, this should have been as obvious to him at the time of trial as now. The only evidence the peti-

[3] Whether in appropriate circumstances such a showing may be dispensed with, we need not now decide.

tioners wished to offer as to the effect of the newspaper publicity, if a hearing were accorded, was the opinion testimony of a supposed expert on mass psychology. Judge Ryan did not abuse his discretion in declining to grant a hearing to receive such opinion evidence. The situation in *Delaney* v. *United States*, 1 Cir., 199 F. (2d) 102, upon which the petitioners so strongly rely, was very different. Not only was the *Delaney* publicity more obviously damaging and much closer to the date of trial but there the defendant did more for a continuance and the denial of this motion was the ground on which the court reversed the appellant's conviction. The best that can be said in the instant case is that, at the time of trial, astute counsel decided that the publicity did their clients no harm, and now want this court to decide otherwise.[4]

[fol. 485] With respect to newspaper publicity during the trial, the petitioners' principal complaint relates to stories concerning the indictment of one Perl. He was indicted for perjury committed in denying that he knew Sobell, Julius Rosenberg and certain persons whose names were prominently mentioned in the trial of the petitioners. The indictment, when returned, was ordered sealed. It was made public on March 15, 1951. The affidavits show that Mrs. Greenglass was still on the witness stand when the story of the Perl indictment was published in the city papers, and that the New York Times carried a statement ascribed to the United States Attorney then in office, as follows:

> "Mr. Saypol said also that Perl had been listed as a witness in the current espionage trial. His special role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who are key Government witnesses at the trial."

The petitioners assert that the unsealing of the Perl indictment and the statement by Mr. Saypol were timed by the

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[4] Of the four trial counsel, two at least must be deemed to have been fully cognizant of this newspaper publicity. For the assertion to the contrary is not made by trial counsel for Mrs. Rosenberg nor by one of the two trial counsel for Sobell.

prosecution with the purpose of prejudicing them in their trial. Since no hearing was accorded, we must, as already stated, assume that publication of the indictment was deliberately "timed" and the statement attributed to Mr. Saypol was made by him. Such assumed tactics cannot be too severely condemned. But the essence of the wrong done the petitioners does not lie in the intent of the prosecutor but in the prejudicial publicity which may come to the attention of the jury. When publicity believed to be prejudicial occurs during a trial, the defendant may move for a mistrial or may request the trial judge to caution the jury to disregard it. *United States* v. *Weber*, 2 Cir., 197 F. (2d) 237, 239. In this case the defendants did neither. We may assume that, in this case, a cautionary instruction would [Fol. 486] not suffice, and that, if defendants had moved for a new trial, it should have been granted. But they did not so move. This was their deliberate choice after conferring with the judge out of the presence of the jury. They now seek to excuse the omission because when they conferred with the judge Mr. Saypol gave assurance that he had not "timed" the Perl indictment. Such assurance they then accepted as true but they have recently concluded that it was false, because Perl has not yet been brought to trial. This is not a valid excuse. As stated above, Mr. Saypol's motive and "timing" in opening the indictment are irrelevant; the wrong consisted in the statement made to the press to the effect that the government had expected to use Perl's estimony to corroborate the Greenglasses, and the intimation that because he had backed out he had been indicted for perjury. Such a statement to the press in the course of a trial we regard as wholly reprehensible. Nevertheless we are not prepared to hold that it vitiates the jury's verdict when there is no allegation or evidence that any juror read the newspaper story and the defendants deliberately elected not to ask for a mistrial. Cf. *Spreckels* v. *Brown*, 212 U. S. 208, 213-215. As they thus chose to have the trial continue, they obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them. Having themselves so concluded, they may not, after an adverse verdict, ask the court to reach a contrary conclusion. Indeed, the petitioners did not mention

the prosecutor's statement in their motions for a new trial nor on their previous appeal.

2. Alleged use of perjurious testimony. The second ground of attack on their conviction is that the prosecution knowingly used false testimony. There are three specifications. The first relates to Greenglass' testimony that on the night of his arrest he did not withhold any facts [fol. 487] from the FBI. When he was sentenced on April 6, 1951, the day after the petitioners' sentences, the United States Attorney stated to the court, "Mr. Rogge protested his innocence" at the arraignment. "Through Ruth Greenglass, his wife, came the subsequent recantation of these protestations, their repudiation and the disclosure of the facts by both of them." On the basis of this statement the petitioners argue that the testimony was false and known to be false by the prosecuting officer. Judge Ryan said that when read in context with all the proceedings on April 6th he did not regard it as an admission that Greenglass had committed perjury and that there was no factual basis for inferring that perjurious testimony had been knowingly used. We agree. It is notable that petitioners made no mention of these facts on their previous appeal although then well aware of them.

The second specification relates to Greenglass' testimony that, the day before he began to testify, he made from memory certain drawings of lens molds used several years before at Los Alamos in the atom-bomb project. The petitioners contend that it would have been impossible for him to make these sketches from memory and hence his testimony that he did so was false and the prosecution must have known it to be false. This is nothing new. For, at the trial, the defendants, on cross-examination, had brought out the details of Greenglass' education, with the patent purpose of persuading the jury that he had lied. In support of their renewed assertion of his perjury, defendants, on the § 2255 motion, presented the affidavits of four scientists who express the opinion that Greenglass, with his limited education as shown at the trial, could not have made the sketches from memory. Since none of them knew Greenglass, none was in a position to give an opinion

about the quality of his memory which, no matter what his education, may have been amply sufficient for this purpose. [fol. 488] As additional evidence concerning Greenglass' memory, these opinions, assuming *arguendo* they would be admissible at a trial, are wholly inadequate to justify a new trial. The affidavits bear solely on the credibility of his testimony and that issue was properly submitted to the trial jury for decision. As to this specification the moving papers were insufficient on their face.

The third specification relates to the rebuttal witness Schneider. He was a photographer. He testified that in May or June 1950 Mr. and Mrs. Rosenberg and their two children came to his shop and had passport photographs taken. He asked whether that was the last time he had seen Julius Rosenberg "before today," and he replied "That's right." In fact he had been brought into the court room by an FBI agent the day before he testified and had identified Rosenberg at that time. Counsel lays stress upon the word "today" to prove the testimony perjurious, but on cross-examination of Schneider at the trial both court and counsel treated the question as meaning "before the trial." Judge Ryan was correct in ruling that there was not the slightest evidence that Schneider's testimony was intentionally false and that in any event it was on an immaterial point, *i.e.*, identification of the Rosenbergs as persons whose pictures he had taken, since the Rosenbergs had not denied that they might have gone to his shop for that purpose, although Julius Rosenberg categorically insisted that they were not passport pictures.

3. Alleged character of information transmitted. The petitioner's next point is that their conviction should be *set* aside because one item of information classified as secret which they were charged with having conspired to transmit to Russia, was so generally known that transmitting it was not forbiddden by the Espionage Act. This matter was thoroughly discussed by Judge Ryan. We have [fol. 489] nothing to add to his opinion, except to say that *United States* v. *Heime*, 2 Cir., 151 F. (2d) 813, cert. den. 328 U. S. 833, upon which the appellants rely, is so different in its facts as to be completely inapposite.

4. The treason clause of the Constitution. Appellant Sobell in his § 2255 petition advances an additional ground for relief which we understand to be as follows: As to him the evidence showed at most "treachery and general intent to betray"; such an intent does not suffice to prove the specific intent required by the Espionage Act but would meet only the general intent called for by the treason clause of the Constitution; and there was here no compliance with the procedural demands of that clause. This contention raises a question of law as to which there was no need for the taking of evidence on the motion. It could have been raised on the prior appeal in support of the argument then made as to the insufficiency of the evidence to prove specific intent which we then held was adequately proved. It was raised before the Supreme Court in the petition for rehearing which was denied. Assuming without decision that nevertheless it may now be raised in its present form by a motion under § 2255, we hold that it is without merit.

5. Also without merit is the contention that the court erred in permitting the transfer of Sobell from New York to Alcatraz, California, pending the presentation of his petition and in declining to direct his return while it was under consideration. Since no issues were raised which required his presence as a witness, it does not appear that his absence was in any respect harmful. See *United States* v. *Pisciotta*, 2 Cir., —— F. (2d) —— (November 3, 1952).

The orders on appeal are affirmed.

[fols. 490-491] In United States Court of Appeals for the Second Circuit

United States, Plaintiff-Appellee,

v.

Julius Rosenberg & Ethel Rosenberg, Defendants-Appellants

Judgment Rosenberg Case—December 31, 1952

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fols. 492-493] In United States Court of Appeals for the Second Circuit

United States, Plaintiff-Appellee,

v.

Morton Sobell, Defendant-Appellant

Judgment Sobell Case—December 31, 1952

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad-

judged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 494] In the United States Court of Appeals for the Second Circuit

[Title omitted]

Petition for Rehearing for Appellant Morton Sobell—Filed January 14, 1953

To the United States Court of Appeals for the Second Circuit and the Judges Thereof:

Comes now Morton Sobell, an appellant in the above-entitled cause, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. The opinion affirming the order on petitioner's application for relief under 28 U. S. C. Section 2255 has characterized the prosecutor's press statement, that Perl would corroborate Greenglass, as "wholly reprehensible" and the assumed tactic in respect of the timing of the Perl indictment as one that "cannot be too severely condemned". The court also assumed that "if defendants had moved for a new trial, it should have been granted".

The judgment, however, is affirmed on the ground that "they did not so move."

[fol. 495] We respectfully urge upon the court that in making such disposition of the case it did not give effect to the Supreme Court decisions which require that "in exceptional circumstances, especially in criminal cases" errors will be corrected where they "seriously affect the fairness, integrity or public reputation of judicial proceedings", even though not objected to or made the subject of motion by trial counsel. *United States v. Atkinson* 297 U. S. 157, 160.

We press upon the court the question: has it not by its own opinion established that Mr. Saypol's tactics were such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings"?

The failure of counsel to move at once for a new trial is assumed in this case to have been a "deliberate choice". This assumption flies in the face of the record, since the affidavit of Mr. Kuntz (R. Doc. XVIII at p. 2) shows that while he was aware of the fact of the Perl indictment, at the time of the off-the-record colloquy, he "was not aware of the statement of Mr. Saypol quoted at page 4 of the affidavit of Howard N. Meyer of November 24, 1952"—the statement quoted in this Court's opinion of December 31, 1952. The affidavit, moreover, indicates that Mr. Phillips did not even participate in the colloquy.

Even in a civil case, conduct incompatible with integrity or public reputation of judicial proceedings will require appellate interference, though not objected to. *New York Central Railroad Co. v. Johnson* 279 U. S. 310. In criminal cases, there is more reluctance to allow imprisonment to depend wholly on vigilance of counsel. *Brasfield v. United States* 272 U. S. 448; there should not be imposed a duty of vigilance to guard against the type of overreaching displayed by Mr. Saypol here. There was here no "express waiver of a prior objection" such as in *Johnson* v. *United States* 318 U. S. 189. And see *Screws* v. *United* — 325 [fol. 496] U. S. 91, 107, (after citing the *Atkinson* dictum with approval) "Even those guilty of the most heinous offenses are entitled to a fair trial".

The facts which must be assumed, in the absence of a hearing, make the situation in *Spreckels v. Brown* 212 U. S. 208, 213, 15, completely inapposite. Counsel there *prevented* precautionary measures and insisted "let the jurors read the papers, we will take our chances". The case there, in any event, was a civil one, a controversy over title to real estate! It cannot be assumed that counsel's inaction here was prompted by a desire to take their chances with this jury; the record contradicts this; eight motions for a mistrial were made (R. p. 184, 185, 1037, 1039, 1199, 1200, 1378 and 1442).

Moreover, the situation at the close of the off-the-record colloquy with the trial judge here—on the basis of the only

version found in *this* record—was one where it was evident that no relief would be granted; in comparable circumstances it has been held that "counsel were not required to do a palpably vain thing". *Thomas* v. *District of Columbia* 90 F. (2d) 424 (App. D. C. 1937).

It is respectfully suggested that the Court reconsider its decision in the light of the authorities cited above, and of Rule 52 (b) F. R. C. P.[1]

2. We respectfully urge that the Court has misconceived the nature of the point tendered by Sobell's claim in paragraph 5 (b) of his 2255 petition.

[fol. 497] His point was made on the assumption that it has been finally held against him that a single conspiracy was proved at the trial. But even on this assumption, he is entitled to complain of pre-trial publicity alluding to him as an "atom spy": accepting for the purpose of this petition, the court's ruling that prosecutive pre-trial efforts to prejudice a community may not be complained of, when not raised in advance of trial, the same principle does not apply to knowingly false pre-trial publicity, the knowing falseness of which could not have been ascertained until after most of the trial had concluded.

In our brief on this appeal we stated, (pp. 7-8):

> "Of course, it is not sought to reargue here this Court's holding (Frank J., dissenting) that the record permitted the trial judge to instruct the jury on the Government's claim of a single general conspiracy which embraced the atomic information project. A different question was presented by the application for relief below in the 2255 proceeding: it was whether Sobell was deprived of a fair trial by an impartial jury by conduct of the prosecutor, which amounted to a fraudulent imposition on the public of a pre-trial pic-

[1] While this branch of the petition for rehearing should be equally available to counsel for the Rosenbergs, he has been prevented from petitioning for rehearing by the terms of an order he obtained to secure a stay of the execution of his clients. Hence, no inference concerning the merits of the point can be drawn from his failure to join in presenting it to the Court.

ture of Sobell as an 'atom spy' and 'member of the Klaus Fuchs spy ring'.

"The answering affidavit of the United States Attorney with respect to the Sobell petition made no response to this point. It merely stated that 'All the other contentions raised in the Sobell petition are identical with those raised in the Rosenberg petition'. (R. Doc. XIX p. 2). Neither in brief nor oral argument did the U. S. Attorney respond to this point. The uncontradicted record is that the prosecutor does not deny that, without any color or claim to justification for having done so, he brought about a pre-trial situation which Sobell and his counsel were completely helpless to contend with, in that they were unaware of the fraudulent character of the pre-trial publicity."

Moreover, in the moving affidavit (R. Doc. XV, p. 12) it was stated:

"It is, of course, no answer to all this that the indictment charged a 'single' conspiracy, and that an alleged co-conspirator has a constructive, albeit fictitious, responsibility for acts of his co-conspirators. The numerous condemnations of petitioner as an 'atom spy'—in many instances alleging direct participation—were not accompanied by cautionary instructions, or addressed to an audience learned in the entangling niceties of the law of conspiracy.

[fol. 498] "Nor is it an answer that the jury was instructed not to convict unless they 'believed' the testimony of Max Elitcher (R. 1560). The purpose of what has been set forth in this affidavit has been to show how the jury was brought, by unconstitutional means, not of record and hence not appealable, to believe a witness whose credibility was so suspect."

"Sobell's argument" is not, as the Court states, that he could not have known, until the government rested its case, "how detrimental" the publicity calling him an 'atom spy' was. It is that he could not have known *how fraudulent* it was. An alleged member of a general espionage conspiracy is no more an 'atom spy' than a member of a conspiracy to

defraud, one of those members may have pocketed a million dollars unbeknownst to him, can be said to have "stolen a million."

Merely because a single trial on a single indictment charging conspiracy was permissible, does not make it honest, or less unfair, to call Sobell an 'atom spy'. And the significance of the distinction is conceded by the statement of Mr. Lane, in opposition to the Rosenbergs' motion to reduce their sentence, where he said in the course of successfully persuading Judge Kaufman to decline to reduce the sentence imposed on the Rosenbergs 'Ordinary espionage is one thing. Atomic espionage is another thing." (S. M. 94, December 29, 1952.)

Conclusion

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted, Howard N. Meyer, Harold M. Phillips, Edward Kuntz, 205 West 34th Street, Attorneys for Appellant Sobell.

[fols. 499-501] Certificate of Counsel

Counsel for the above named appellant hereby certifies that the foregoing petition for a rehearing of this cause is presented in good faith, on grounds believed to be meritorious, and not for delay.

Dated: New York, New York, January 14, 1953.

Howard N. Meyer.

[fol. 502] In United States Court of Appeals for the Second Circuit

[Title omitted]

Denial of Rehearing Sobell Case—January 19, 1953

Before: Swan, Chief Judge, Chase and Frank, Circuit Judges

Petition for Rehearing

Howard N. Meyer, Harold M. Phillips and Edward Kuntz, Attorneys for appellant.

Per Curiam:

Petition for rehearing is denied.

T. W. S., H. B. C., J. N. F.

Filed January 19, 1953.

C. JJ.

[fols. 503-504] Order Denying Rehearing Sobell Case—January 19, 1953

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, By A. Daniel Fusaro, Deputy Clerk.

[fol. 505] Clerk's Certificate to foregoing transcript omitted in printing.

Office - Supreme Court, U.S.
FILED
MAR 30 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG AND ETHEL ROSENBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EMANUEL H. BLOCH,
JOHN F. FINERTY,
Counsel for Petitioners.

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Cases Cited

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Hysler v. *Florida*, 315 U.S. 411 (1942) 40
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United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (C.C.A. 2nd, 1946) 43
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United States v. *Heine*, 151 F. 2d 813 (C.C.A. 2nd 1945) cert. den. 328 U.S. 833 ..... 55, 56
United States v. *Marrin*, 159 F. 767 (D.C.E.D. Pa. (1908) 43
United States v. *Mitchell*, 322 U.S. 65 (1944) 31, 42
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG AND ETHEL ROSENBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Julius Rosenberg and Ethel Rosenberg, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered December 31, 1952 (R. 329), affirming an order of the United States District Court for the Southern District of New York, entered December 10, 1952 (R. 5),[1] dismissing their joint application under 28 U.S.C. § 2255, to vacate and set aside the judgments of conviction for conspiracy to

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[1] "R." refers to transcript of record herein; "C.R." refers to the transcript of record of the criminal proceedings which was filed in this Court — Docket No. 111, October Term, 1951. Copies thereof were annexed, as Exhibits "A" (Vol. I), and "B" (Vol. II), and made part of the instant application.

violate the Espionage Act [50 U.S.C. § 34, now 18 U.S.C. 794], under which they were sentenced to death.

Opinions Below

The opinion of the Court of Appeals appears in the record at R. 329 and is reported in 200 F. 2d 666. The opinion of the District Court appears in the record at R. 8 and is reported in 108 F. Supp. 798.

Summary of Matter Involved

History of the Proceedings

Petitioners JULIUS ROSENBERG and ETHEL ROSENBERG, his wife, were convicted in March, 1951, after trial before judge and jury in the United States District Court for the Southern District of New York, of conspiracy, during World War II and for some years thereafter, to transmit information "relating to the national defense to the Soviet Union, with the intention to advantage that nation" (though not to injure the United States), in violation of Sec. 34, Title 50, U.S.C. [now U.S.C. 794] (R. 31).

The main concern of the prosecution was the theft of atomic-bomb information stolen from the Los Alamos Project and siphoned to the Soviet Union. Its case rested on the accomplice testimony of David Greenglass (brother of the petitioner Ethel Rosenberg) and Ruth, his wife. "If [their] testimony were disregarded, the conviction could not stand." *United States* v. *Rosenberg,* 195 F. 2d 583, 592 (C.A. 2d, 1952). David Greenglass, a co-defendant, pleaded guilty prior to the petitioners' trial, but was not sentenced until after the petitioners' conviction when he received a sentence of 15 years (C.R. 2-4; 1638). Ruth Greenglass, also an admitted spy, was never arrested, indicted, or prosecuted for her crime and is presently a free woman (C.R. 593, 740).

Judgments of conviction, sentencing both of the petitioners to death, were entered on April 5, 1951 (R. 31). Pursuant to these judgments, the petitioners were committed to, and are presently detained in the death house at Sing Sing Prison, Ossining, New York to await the execution of their sentences (R. 31-2). The United States Court of Appeals for the Second Circuit affirmed the judgments of conviction on February 25, 1952, and denied rehearing on April 8, 1952 (195 F. 2d 583, 609). This Court denied certiorari on October 13, 1952 (344 U.S. 838) and rehearing on November 17, 1952 (344 U.S. 889), Black, J., in each instance, noting his opinion that the petition should be granted.

The instant proceeding, under 28 U.S.C. § 2255, to vacate and set aside the petitioners' convictions and sentences, was instituted on November 24, 1952, in the United States District Court for the Southern District of New York by petition and order to show cause (R. 30-129).

The petition alleges facts to show that the convictions and sentences were unjustly, unlawfully and illegally procured in violation of the Constitution and laws of the United States and that the sentencing court was without jurisdiction to impose the sentences, so as to render the judgments subject to collateral attack (R. 30-129).

The Government was permitted to submit affidavits in opposition (R. 130-150). The petitioners were afforded the opportunity to supplement their petition by affidavit (R. 151-57). They were confined, however, to the submission of reply affidavits to rebut facts deemed by the District Court to have been put in issue by the Government's opposition affidavits (R. 157-167).

Upon the record thus made, and upon the files and records of the case, the District Court, on December 10, 1952 after oral argument (R. 238-328), dismissed the petition without a hearing. The Court of Appeals for the Second Circuit

affirmed the order of the District Court on December 31, 1952 (R. 329), and on February 17, 1953 entered an order staying the execution of the petitioners' sentences pending the due filing of a petition for a writ of certiorari and until further order of this Court.[2]

The Present Proceeding

The record in this proceeding is an exposé of sordid scheming on the part of the prosecution to secure the con-

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[2] This case reaches this Court in an extraordinary posture: judicial reduction and executive commutation of these sentences have already been denied, although the petitioners have not exhausted their remedy in this Court. The events which led to this situation are a result of an egregious impatience of the sentencing court with petitioners' pursuit of judicial redress.

After this Court denied rehearing of its decision to deny to the petitioners a writ of certiorari to review their original convictions, the sentencing court re-fixed the date of executions for the week of January 12, 1952. No stays of execution were granted by the District Court or Court of Appeals pending the processing of the instant application. In the course of these proceedings, and within the statutory 60 day period after issuance by the Court of Appeals of the mandate in the criminal proceedings, the petitioners, on December 29, 1952, applied to the sentencing court for a reduction of their sentneces, which application was denied. On January 6, 1953, the sentencing court then entered an order staying the execution of the petitioners' sentence to afford them an opportunity to appeal to the President of the United States for executive clemency. The stay was to continue until the President acted and for five days thereafter. It was uniquely conditioned, however, in essence, upon the petitioners' refraining from pursuit of any judicial remedies, including the processing of this petition, until the President had acted.

On February 11, 1953, the President denied a commutation of sentence. On February 16, 1953, after a hearing for the refixing of execution date, the sentencing court, with knowledge of petitioners' intention to exercise their right to appeal to this Court, set the week of March 9, 1953, as the date of execution, on the thesis, expressed at the hearing, "that the time has come when . . . the administration of justice shall proceed with assurance and without delay. . . ."

After consideration of these facts and the substantiality of legal questions to be presented, and to protect the right of the petitioners to appeal to this Court, the Court of Appeals for the Second Circuit, on February 17, 1953 stayed the executions, pending the due filing of this petition with, and further order of this Court.

viction of these petitioners by fair means or foul. It establishes the deliberate use of false testimony, which, in at least one instance, the Government was constrained to admit (R. 149-50). It establishes conduct on the part of the prosecution, during the trial, designed to bring irremediable prejudicial influences to bear on the jury, which the court below asserted "cannot be too severely condemned" (R. 334). It establishes prosecution practices, before the trial, to turn the public mind and the jury against the petitioners, which the District Court in this case characterized as "opposed to all fundamental concepts of due process" (R. 13). It establishes that the prosecution grossly and deliberately inflated the quality of the offense to make inevitable the verdict and the imposition of the unprecedented sentences of death upon the petitioners. Through its immoral, unconscionable and intentional deceptions of the court and jury—some of which, fortunately, have been discovered in time—the prosecution "contrived a conviction through the pretense of a fair trial which, in truth, [was] used as a means of depriving" these petitioners of their very lives. *Mooney* v. *Holohan,* 294 U.S. 103 (1935)

I

Perjured Testimony

1. The Atom-Bomb Sketch Perjuries

The most flagrant perjury, in a case replete with perjury, is the crucial evidence from the mouth of David Greenglass, the star witness for the prosecution, of the transmission of "secrets" of the Nagasaki atom-bomb. Patently, had it been known that Greenglass' testimony in this major respect was perjured, the jury would have considered his entire testimony in another light. It has already been noted that the Court of Appeals, affirming in the criminal appeal, declared that the convictions could not stand with-

out the Greenglass testimony. The perjury acquires a most fateful significance from the trial judge's reliance on the assumed truth of the testimony as cause for imposing the unprecedented sentences of death upon the petitioners (C.R. 1614-15).

The crux of the Goverment's case was Greenglass' testimony that he delivered to Julius Rosenberg, in September, 1945, a sketch of the Nagasaki atom-bomb and twelve pages of written material descriptive of the component elements of that bomb, their action and inter-action, and the principles of operation of the bomb itself (C.R. 493, 495-98). The prosecution was permitted, under the "charts, maps and diagrams" rule, to offer in evidence an alleged replica of the sketch allegedly turned over to Rosenberg (C.R. 463). This replica was prepared in March, 1951, at the time of, and for the purpose of being introduced at the petitioners' trial. This replica is the celebrated Exhibit 8, which, together with the testimony orally restating the contents of the twelve-page report, was impounded by the trial court (R. 499).

Explicit proof that such testimony was wholly incredible did not appear in the original record because of a ruling of the Trial Judge excluding potential proof of such incredibility (R. 916), but the improbability of this testimony was implicit even in the testimony itself as originally given. Explicit proof of the total incredibility, i. e., perjury, of this testimony was supplied in this proceeding by the affidavits of two leading British, and one French, scientists, which had been appended to the petitioners' application (R. 113-123).

These affidavits, as will later be noted, establish that Greenglass' testimony is false because (1) it is inconceivable that anyone with Greenglass' lack of background and experience could originally ever have been capable of producing a sketch of a cross-section of the Nagasaki atom-

bomb and twelve pages of descriptive material relating thereto; and (2) because even had Greenglass been able originally to produce such sketch and descriptive material, neither he, nor even a trained scientist, could have reproduced them at the time of the trial, more than five years later, wholly from memory, and without aid from any other source.

Greenglass was not a scientist. His formal education was limited to high school (R. 82; C. R. 610-15). After graduation, he attended a polytechnical institution for a single semester and failed each of the eight courses in which he was enrolled (R. 83). His remaining adult education was restricted to attendance for a year and a half at the Pratt Institute in Brooklyn, N. Y. (R. 83). He never acquired a degree in science or engineering; nor had he ever taken any courses in calculus, thermodynamics, nuclear or atomic physics, or quantum mechanics (R. 83). In answer to the question whether he knew anything about the basic theory of atomic energy, he answered:

"I know something about it, yes, I am no scientific expert, but I know something about it." (C. R. 612)

He did not further define what he did know about "it."

This is the sum total of Greenglass' educational qualifications as shown of record.

Greenglass testified that prior to entering the Army in 1943, he had practical experience as a machinist. After basic training, he was first assigned to the Ordnance School at Aberdeen, Maryland, as a machinist (C. R. 396), and after service at various other posts, he was sent, in July, 1944, to the Manhattan District Project at Oak Ridge, Tennessee, for two weeks of orientation, prior to his transfer to Los Alamos (C. R. 397-98).

His orientation consisted of being told that Los Alamos was a secret project, but he was not told, and did not know,

what the secret was (C.R. 397). In August, 1944, he reached Los Alamos (C.R. 398). The most stringent regulations, which prevailed at the Los Alamos project affecting the conduct of employees, forbid persons on Greenglass' level from gaining access to information about the work, experiments or projects being conducted, except in the restricted area in which they worked (G.E. 1, 19, 20; C.R. 618-25, 406-09).

Greenglass never observed or examined the Nagasaki atom-bomb, or a blueprint, or drawing or sketch of the weapon at Los Alamos or elsewhere, from which he might have made a reproduction.

He swore that the original sketch and the twelve pages of expository matter which he allegedly delivered to Rosenberg in September, 1945, were composed by him from memory alone, revived out of scraps of oral information gleaned at the project through random questions and conversations (C.R. 493, 495-98, 609, 613, 619-21, 627-27).

The prosecutor asked Greenglass the following questions and received the following answers:

> "Q. . . . did you, in ensuing months, gather information concerning the atom bomb?
>
> A. I did.
>
> Q. Will you tell us just how you went about them?
>
> A. I would usually have access to other points in the project and also I was friendly with a number of people in various parts of the project and whenever a conversation would take place on something I didn't know about I would listen very avidly and question . . . the speakers to clarify what they had said. I would do this surreptitiously so that they wouldn't . . . I would do it so they wouldn't know.
>
> * * * * * * *
>
> "Q. No, in addition to that fact, you yourself were working on various things used in connection with the experimentation used on the atom bomb?

A. That is correct.

Q. Such as this high explosive lens?

A. High explosive lens molds were made in my shop and I got—as a matter of fact, there were molds used on the atom bomb.

Q. Was it on the basis of this knowledge that you had accumulated over those months that you told Rosenberg you thought you had a pretty good description of the atom bomb itself?

A. I did." (C.R. 494-495)

This is the sum total of the prosecutor's direct examination of Greenglass and of Greenglass' testimony as to the means by which he, a machinist without any scientific training whatsoever, was able to obtain the highly technical and top secret information which allegedly made it possible for him to draw for Rosenberg a sketch of a cross-section of the Nagasaki atom-bomb, and to write out for him twelve pages of material descriptive of its component elements, their action and inter-action and the principles of operation of the bomb itself. It was solely on the basis of this "information" that Greenglass testified he was able to tell Rosenberg: "I think I have a pretty good description of the atom bomb." (C.R. 496)

Although, according to his testimony, Greenglass' ability to produce a sketch of the cross-section of the atom-bomb was based on "conversations" with scientists on the project, his testimony was a studious evasion of statement of the names of those from whom he obtained this information. The single exception was a soldier-scientist, William Spindel, and his information was confined to the fact that a man known at Los Alamos as Baker was actually the atomic scientist Nils Bohr (C.R. 620).

His claim to competence to reproduce the structure of the atom-bomb and explain its operation is belied by the

testimony of his own response to an inquiry of an alleged confederate in 1945:

> "The Witness: He wanted to know the formula of the curve on the lens; he wanted to know the H. E. used, and means of detonation . . . but the things he wanted to know, I had no direct knowledge of and I couldn't give a positive answer." (C.R. 453)

Nor could he, on *cross-examination* at the trial answer a similar question (C.R. 628):

> "Q. You did not even know the formula for the curvature, did you?
>
> A. That is exactly correct.
>
> Q. What? You had to be a scientist to know the formula, isn't that right?
>
> A. That is right."

The preposterousness of Greenglass' claim is enhanced when it is realized that his lack of scientific development or understanding was not compensated by the capacity of his powers of observation. Some indication of his lack of knowledge is illustrated by his testimony that, although he arrived at Los Alamos in August, 1944, it was not until his wife visited him on November 29, 1944, during a furlough to Albuquerque, that he discovered the project was concerned with the construction of the atom-bomb. He learned this fact only when his wife told him that Julius Rosenberg allegedly had told her—

> ". . . that I was working on the atomic bomb; that was the first I knew of it." (C.R. 399)

These facts formed the basis for the scientific judgment that Greenglass was incapable of having prepared the

sketch of the cross-section of the Nagasaki atom-bomb or the description of its workings. [3]

The judge had foreclosed inquiry into this specific subject on the trial. Derry, called as the Government's atomic expert, was asked, on cross-examination (C.R. 916):

> "Q. Would you say as a scientist, a graduate engineer who has received college courses and received a degree in engineering, and had the experience you have detailed to us here, that a machinist without any degree in engineering or any scientist (science) would be able to describe accurately the functions of the atom bomb and its component parts . . . both in relation to their independent functions and their interrelated functions?"

The judge, *sua sponte*, sustained the objection.

In this proceeding, the record evinces independent evidence, necessarily *dehors* the trial record, of Greenglass' utter incapacity to have performed as he testified he did.

The affidavit of T. R. Kaiser, a British scientist, presently employed in connection with British atomic-bomb development, states:

> "Question: . . . Could a person of Greenglass' background and experience have produced in 1945 a sketch of a cross-section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such a bomb and its component parts, drawing solely from memory and without the aid or assistance of any person or written matter or technical or scientific source of coaching?
>
> Answer: . . . It is inconceivable that a man in the position of said Greenglass, without specialist training and experience, could have accomplished this feat in 1945." (R. 120-21)

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[3] The deposition of Kaiser, and the other scientists hereinafter referred to, were founded upon a reading of the full testimony of Greenglass, as it related to scientific matters, and of John A. Derry and Walter Koski, the Government's "expert" scientific witnesses.

The conclusive evidence that the testimony of Greenglass was perjury and that the Government knowingly contrived it for the purpose of, and deliberately used it at, the trial is found in the circumstances surrounding the introduction into evidence of Exhibit 8.

Greenglass swore that the replica of the sketch of the Nagasaki atom-bomb he testified he gave Rosenberg, Exhibit 8 (made five and one-half years after its alleged original production), was prepared by him from memory alone and without the aid of any person or any reading sources furnished to him by the authorities or any other person (C.R. 609-11; R. 82-3).

He swore further that his trial testimony, orally restating the contents of the twelve-page report that allegedly accompanied the delivery of Exhibit 8, was also based solely on unaided memory (C.R. 608-11; R. 82-3).

The affidavits of scientists, that form part of this record, are unequivocal attestation to Greenglass' absolute incapacity to have performed this feat.

T. R. Kaiser states (R. 121):

> "I repeat my answer to the previous question and say that it is likewise inconceivable that the said David Greenglass could have reproduced the matter in question in 1951 without the aid or assistance or any person or written matter or help from any technical or scientific source."

(This scientist even questioned his own ability to perform a like fact in his own special field.)

Jacques S. Hadamard states (R. 122-23):

> "It is inconceivable that Greenglass could have reproduced replicas of a cross section of the Nagasaki type of bomb plus explanatory matter after a lapse of five or six years, relying solely on his unaided memory. It is more inconceivable still that Greenglass could have given lengthy and detailed explanations not only

on the component parts of the bomb, but also on their functions and workings; all he could not have any idea of and which nobody is alleged to have given him even an idea."

J. G. Crowther states (R. 115):

". . . that it is his opinion that it would have been impossible for the said David Greenglass to have reproduced in the years 1950 or 1951 a reliable replica of a sketch of a cross section of the Nagasaki type of atom bomb together with twelve pages of matter explaining the functions and workings of such bomb and its component parts, the said sketch having been last seen by the said David Greenglass five years previously and the said David Greenglass relying for the reproduction solely on memory and without any outside aid or assistance."[5]

Derry, one of the Government's "experts", was shown Exhibit 8 and had read to him the untranscribed explanatory oral testimony. He stated that the exhibit was a substantially accurate representation of a cross-section of the Nagasaki atom-bomb and affirmed, as well, the substantial accuracy of the oral explanation (C.R. 908-15).

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[5] Greenglass had also testified he delivered (1) to Julius Rosenberg in January, 1945, a sketch of a high explosive lens mold and related descriptive material used in atomic experiments at the Los Alamos project (C.R. 428-29, 438-39); and (2) to Gold, a named conspirator, in June, 1945, sketches of a later development of a lens mold in schematic view, and explanatory data (C.R. 458-60).

On the same theory, the Government had been permitted to introduce replicas of Exhibit 2 (January, 1945, incident) and Exhibit 7 (June, 1945, incident) similarly prepared prior to the trial, and Exhibit 6 (June, 1945, incident) prepared on the day of Greenglass' arrest, all allegedly from memory alone, without outside aid.

The same scientists referred to above expressed varying degrees of incredulity respecting Greenglass' capacity to produce the replicas in 1950 and 1951, in spite of the fact that he had actually worked on phases of the construction of these mechanisms (R. 119-21; 115; 122-23). These opinions necessarily fortify the conclusion that Greenglass was not capable of having produced the replica of the cross-section of the Nagasaki atom-bomb.

Since the scientific affidavits show the incapacity of Greenglass to draw or explain the cross-section of the Nagasaki atom-bomb, and since Exhibit 8 and the accompanying explanatory testimony was a substantially accurate representation, it is patent that Greenglass' testimony was false (1) as to his preparation of the original sketch and report; and (2) as to his preparation of Exhibit 8 and its testimonial explanation from memory alone, and without any outside aid.

The indicia of the Government's connivance to produce, and its deliberate and knowing use of, this false testimony are found:

(1) In the inherent improbability of Greenglass' story, precluding the possibility of the prosecutor's innocent use of it.

(2) In the singular fact that although Greenglass allegedly "confessed" in the early summer of 1950 (C.R. 577-78; 604), and although the delivery of the sketch (and information) concerning the Nagasaki atom-bomb formed the core of the Government's case, this incident was not, as were other alleged transmittals, listed as an "overt act" even in the last superseding indictment of January, 1951 (C.R. 2-4).

(3) Inasmuch as Exhibit 8, as well as Exhibits 2, 6 and 7, were prepared by Greenglass after he was already in the custody of the United States Government, he could not have been aided or coached by any person or reference books without the knowledge of the prosecuting authorities or their agents.

These exhibits went to the gravamen of the case and the essence of Greenglass' testimony. As can well be understood, they constituted to the lay mind of the jury most damaging evidence. The suppression concerning the truth, that these exhibits were literally "manufactured" for trial,

as a hearing on this petition would have more fully revealed, was a most profound imposition upon the court and a measure of the magnitude of the extent to which the evidence on which the petitioners were convicted was a result of fabrication.

2. The Passport Photographer Perjury

Ben Schneider, a photographer (R. 1425-26), was the last Government witness. Produced as a "surprise" in rebuttal, his testimony provided a dramatic climax to the trial. His name had not appeared on the Government's list of witnesses (C.R. 51-2), notice of which in advance of the trial was required to be given to the petitioners [18 U.S.C. § 3432]

He testified on March 27, 1951. He swore that in May or June, 1950 he had taken passport photos of the petitioners and their children at his photography shop, located within walking distance from the petitioners' home (C.R. 1427-29). He swore further that the first time any Government official communicated with him was on the morning of March 26, 1951 (the day before he testified) when two F.B.I. agents exhibited to him photographs of the petitioners and he then and there, initially, made a positive identification of the petitioners as the persons whose passport photos he had taken (C.R. 1425-26; 1429).[6]

He testified then as follows:

"Q. Did you then deliver it (the photos) to Mr. Rosenberg?
A. Yes.
Q. Did he pay you?
A. That's right, sir.

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[6] The Government pressed the claim concerning this first approach to the witness on the morning of March 26, 1951 to excuse its non-performance of the statutory requirements (C.R. 1425-26).

Q. *And is that the last time you saw him before today?*

A. *That's right.*

Q. Now when the agents came to visit you yesterday, did they show you photographs?

A. They did.

Q. Was it from those photographs that you picked him (Rosenberg) out?

A. That's right.

Q. And is it seeing him here with his wife that recalls it to your memory that they were the persons who came in?

A. That's right; that's right." (C.R. 1429)

The answer to the question relating to the "last time" the witness saw Rosenberg before "today" (the day he testified) was false and known by the prosecution to be false.

The record shows that the Government admitted that after the alleged visit of these F.B.I. agents and later that day, March 26, 1951 (the day prior to his testimony) Schneider was introduced secretly into the courtroom by an F.B.I. agent, on the order of the prosecutor, in violation of the court's direction excluding all witnesses, to secure his *uncertain* identification of the petitioners made earlier that morning (R. 86).[7]

The Court below finds absence of falsity in Schneider's answer because "on cross-examination of Schneider at the trial, both court and counsel treated the answer as meaning 'before the trial' " (R. 336). The finding is without the slightest foundation (C.R. 1429-41).

The Court below found that Schneider, having "no motive for falsehood", had not intentionally lied (R. 336). The secretive intrusion of this witness into the courtroom without the knowledge of the petitioners and the

[7] The Government admitted these facts in its opposing affidavits (R. 149-50).

court, and in violation of its plain direction that all witnesses be excluded from the courtroom; and the reason for the necessity of the prosecutor's introduction of him into the courtroom, all attest to the motive for his lie: the concealment of his uncertain identification. The prosecutor's motive, the only relevant factor, was to keep from the court his deliberate breach of its order.

The issue of Schneider's ability to identify the petitioners was squarely put in issue. The cross-examination of Schneider revealed that he had seen photos of the petitioners in the newspapers after their arrest, but, he claimed, he could not, from these pictures, identify them *as persons who took passport photos in his place,* because there was no side-view (C.R. 1432-33). This record shows that he was not even certain when the F.B.I. agents came to him (R. 86), although he testified that when they showed him a side-view of the petitioners he was positive that it was they who had come to his shop to take passport photos and had told him, at the time of the taking of these pictures, that the family intended to go to France to settle Ethel Rosenberg's estate (R. 85; 1428-29).

For the Court below to have ruled that the falsity was immaterial because the Rosenbergs' testimony shows that they *may* have entered the Schneider shop to take casual photos (R. 336), is a patent absurdity. The question of identification of the Rosenbergs as casual customers was not in issue. It was their identity as *takers of passport photos,* categorically denied by the Rosenbergs, that was of the essence of his testimony.

Schneider's testimony was highly important for two reasons. First, the main subject of his testimony related to the sensitive question of "flight." Secondly, it served to corroborate, where there was no other corroboration, the testimony of David Greenglass that the petitioners intended to flee this country to avoid arrest (C.R. 529, 713).

It is not an unfair inference that had the jury known that this witness apparently needed aid in his identification, it would have substantially affected their acceptance of the testimony.

3. The Greenglass "Confession" Perjury

David Greenglass testified he did not "conscientiously withhold" any facts from the agents of the Federal Bureau of Investigation on the night of his apprehension on June 15, 1950, and that the facts he related to them were "to the best of [his] knowledge at this time" (R. 78; C.R. 577-78).

On the morning of June 16, 1950, a few hours before his arraignment, Greenglass retained O. John Rogge, Esq. to represent him as his attorney. He swore he had not told his attorney "to fight the case" (R. 79; C.R. 577-78).

This testimony was obviously designed to convey to the jury that Greenglass had made an immediate and honest disclosure of his and his wife's involvement and of his implication of Julius Rosenberg in the crime of espionage.

The testimony was false and perjurious and known to be so by the prosecutor.

Nevertheless, U. S. Attorney Saypol, the chief prosecutor, permitted this testimony to stand without challenge and without any attempt during the trial to elicit the truth.

The proof of the falsity came later from the lips of the prosecutor.

On Greenglass' sentence (which occurred after the trial and sentence of the petitioners) U.S. Attorney Saypol stated in open court:

> "I remember well . . . at [Greenglass'] arraignment . . . Mr. Rogge protested his innocence. Through Ruth Greenglass, his wife, came the *subsequent recantations of these protestions, their cooperation and the*

disclosure of the facts by both of them. (Emphasis ours).

Rogge supplied confirmation. On those same sentence proceedings of Greenglass, he told the Court:

> "I want to emphasize . . . that [David Greenglass] did cooperate with the government and *almost* from the outset. . . ." (R. 81; C.R. 1628).

The circumstances surrounding Greenglass' ameliorated treatment in jail (C.R. 596-99) after his wife's initial and continued consultations with Rogge (C.R. 732, 779-80); the ensuing conference in the U.S. Attorney's office between David and Ruth Greenglass, Rogge and the prosecuting authorities (C.R. 742-43); the vagueness of the Greenglasses about the subject matter of the conference, as contrasted with their clear memories of events five years old (C.R. 601-2, 743); the written statements of the Greenglasses and their cooperation with the authorities that followed this conference (C.R. 604, 743); the immunization of Ruth Greenglass from prosecution (C.R. 740); the treatment accorded Rosenberg on June 16, 1950 when he was interrogated by the F.B.I. and not detained after the questioning (C.R. 1137-41) and his arrest a few days after the Greenglass' conference with the authorities, all offer eloquent proof that the prosecutor knew that Greenglass had not "confessed" immediately and yet, had allowed the witness to so testify.

A sharp issue of fact was presented to the jury, the resolution of which turned on whether they believed the Greenglasses or the petitioners.

The petitioners, who have always asserted their innocence, defended on the ground that the Greenglasses schemed to implicate them in the crime of which they were convicted, "as part of a deal" with the prosecution, to mitigate

retribution against themselves for their confessed crimes.

If David Greenglass had not "confessed" to the authorities until some time after his apprehension, the inexorable logic of the defense position would have been evident. False testimony that his "confession" was immediate correspondingly weakened this position, and substantially contributed to the conviction of the petitioners.

The Court below, in refusing to regard the statement of Saypol "as an admission that Greenglass had committed perjury" closed its mind to the plain meaning of the word "recantation." A recantation, as is well known, is a retraction and denotes a renunciation. To recant is to "recall," "withdraw or repudiate formally and publicly opinion formerly expressed," "take back openly," "retract," "revoke," "repudiate", "disavow," *(Webster's New International Dictionary* (2nd Ed.) Unabridged. It must be assumed that Mr. Saypol, as a lawyer, was not using the word "recantation" except in its normal, dictionary, and usually accepted meaning. The only reasonable inference to be drawn from Mr. Saypol's remarks is that Greenglass did not "confess" immediately but only after the intervention of his wife did he "subsequently" repudiate his earlier claims of innocence and "cooperate" and "disclose" the "facts".

II

The Perl Indictment

The history of the Perl indictment records a scandalous defilement of the administration of justice by officials entrusted with the grave responsibility of prosecution. During the trial of the petitioners, one William Perl, listed as a prospective prosecution witness (C.R. 52), and inferred

to be an espionage agent, was indicted for perjury in denying that he knew: (1) the petitioner, Julius Rosenberg; (2) Morton Sobell, a co-defendant on trial with the petitioners; (3) Ann and Michael Sidorovitch, (husband and wife) the former named by Greenglass on the trial as a confederate of the petitioners, and both on the list of Government witnesses, although not called to testify; and (4) Helene Elitcher, the wife of Max Elitcher, the first prosecution witness, herself named on the list of Government witnesses, although not called (R. 70).

Defense counsel learned of the charges against Perl on the morning following the unsealing of his indictment and his arrest. The fact of Perl's indictment, to which their knowledge, at that time, was confined, was brought immediately to the attention of the trial judge. At an off-the-record conference before the judge between the prosecutor and defense attorneys, the latter expressed concern over the possible impropriety of the procurement and publication of the indictment. They were assured by the prosecutor that the indictment was returned in the regular course of the administration of criminal justice, and were enjoined by the trial judge to accept his word (R. 155, 207-8, 268). This representation was a deliberate falsehood. It was purveyed by the prosecutor to conceal from the Court and the defense the stratagem of the prosecution to "time" the Perl indictment as a means of adducing inculpating evidence through the channels of the mass media of communication and to convey to the jury the idea that the petitioners were further associated in the business of espionage. Only the passage of time uncovered the purposefulness of the deceit.

Perl's alleged perjury was charged to have been committed before a federal Grand Jury, sitting in the Southern District of New York, on August 18 and September

11, 1950, some seven months prior to his indictment on March 13, 1951 (R. 70, 73).[8]

The trial of the petitioners commenced on March 6, 1951 and terminated when the jury returned its verdict of guilty on March 29, 1951. The Perl indictment, returned on March 13, was unsealed on the evening of March 14, 1951, by Irving R. Kaufman, the presiding judge in the petitioners' trial (not sitting in the regular criminal part), and a bench warrant issued (R. 74).

David Greenglass, the Government's main witness, had that day completed his testimony. Ruth Greenglass, his wife, the second major witness, on the morning of March 15, was in the midst of cross-examination. Perl was apprehended the night of March 14 and arraigned March 15 (R. 74).

Upon Perl's arrest, the chief prosecuting attorney made a public statement—characterized by the Court below as "wholly reprehensible" (R. 334)—which the press, on March 15, reported to be:

> "Mr. Saypol said that Perl had been listed by the Government as a prosecution witness in the current espionage trial. *His special role on the stand, Mr. Saypol added, was to corroborate certain statements made by David Greenglass and the latter's wife, who*

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[8] The Government opposition affidavits, assert that, although "extensive investigation" of Perl's Grand Jury testimony was conducted, only an alleged admission of Perl, made on March 6, 1951 precipitated the indictment (R. 137, 142-43). These affidavits are contradicted by the record (e.g., R. 154, C.R. 304). To support the allegations of *mala fides* of the prosecution, petitioners made an offer of proof to subpoena the minutes of the Grand Jury that returned the Perl indictment, in order to show that the Government had proof, months before its return, to prosecute Perl for his alleged crime. This offer was rejected by the Court (R. 249-50).

The Court of Appeals properly excluded the Government affidavits from its consideration. *White* v. *Ragen*, 324 U.S. 760 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945); *Williams* v. *Kaiser*, 323 U.S. 471 (1945). The contradictions established an issue of fact which could be determined only after a hearing, and not on the face of the record. *Walker* v. *Johnston*, 312 U.S. 275 (1941).

are the key Government witnesses at the trial." (emphasis added) (R. 74)

To the date of the filing of the petition herein, Perl had not been brought to trial, although, over Government resistance, he had repeatedly pressed for an immediate trial. In June, 1952, more than a year after the conclusion of the petitioner's trial, the Government finally revealed its hand by its refusal to try Perl until "the Rosenberg case and related matters have been concluded" (R. 75-77, 180-82).

Upon this record, the Court below concluded that petitioners had made a showing "that [the] publication of the indictment was deliberately 'timed' " by the prosecution (R. 334).

The publication of the Perl indictment was accompanied by sensational front-page stories in every New York City newspaper (R. 70-73). All reportage explicitly connected the indicted Perl in criminal confederacy with the petitioners. The common denominator of banner headline coverage read: "College Scientist Arrested As Liar in Atom Spy Case". (R. 70-71). The contents of the news stories exploited Government affirmations of Perl's guilt and its specifications of his alleged enmeshment in espionage to corroborate the testimony of prosecution witness and to endow relationships, innocent on the face of the record, with invidious meaning. The color of veracity was infused into the Greenglass testimony: (1) that the petitioners were confederated in espionage with Ann Sidorovitch; and (2) with a "Cleveland contact", by virtue of the reporting of Perl's former and the Sidorovitches' contemporaneous Cleveland residence (R. 75).

Elitcher's testimony of purely social meeting among himself, Rosenberg, "William Mutterperl" [stated to be Perl's former name] and others (R. 304-5), was given conspiratorial overtones by the stigma which attached to Perl. The disclosure of the prosecutor, reported in the press that

Perl "was part of the whole atom spy investigation and was given money by Vivian Glassman to flee the country" (R. 73), made it impossible, thereafter, for the name of Vivian Glassman to be associated innocently with the petitioners (C.R. 1193-95).

The prosecutor, in the trial itself, made capital of the public indictment of Perl and newspaper accounts which he had himself inspired. At the outset of the cross-examination of Rosenberg, the prosecutor introduced the subject of a Perl-Rosenberg relationship in a manner to evoke, necessarily, information concerning Perl's arrest for perjury and to indicate that his sole interest was to place the name of the indicted Perl before the jury in criminal combination with Rosenberg (R. 75, C.R. 1159-60). In the same way, the prosecutor converted to his service the criminal repute which he had himself publicly attached to the name of Vivian Glassman, to cast doubt on Rosenberg's testimony of their noncriminal association (R. 75; C.R. 1193-98).

The coup effected by the prosecution in the "timing" of the indictment of Perl carried over into the trial period its pre-trial tactic of instigating and promoting damaging newspaper publicity that induced a communal acceptance of the petitioners' guilt and instilled hostility against them.

III

Government Inspired Trial and Pre-Trial Publicity

The petitioners represented that a tremendous and almost unprecedented volume of pre-trial and trial newspaper publicity, caused and stimulated by the prosecutive officials, had deeply ingrained in the public of the Southern District of New York a profound pre-conception of the petitioners' culpability; no jury chosen from among this

section of the population could have escaped that hostile influence in arriving at its verdict (R. 34-35).

The record established in minute detail that at every step in the processing of the prosecution of the petitioners, the Government "fed" information to the press concerning them. (R. 61-69). This information—buttressed by the prestige of the F.B.I., the Justice Department and the local U. S. Attorney's office, from which it emanated—(1) affirmed the guilt of the petitioners; (2) disclosed evidence which it intended to use at the trial, as well as alleged evidence never produced at the trial; (3) asserted that they were Communists and that that ideological tie was the motivation for their crime; (4) connected them with Fuchs and other confessed spies and acknowledged Communists who, it was said, with them, were solely responsible for the Soviet development of the atom bomb (R. 61-69; 161-64).

The first press release—issued jointly by the then Attorney General, J. Howard McGrath, and J. Edgar Hoover, Director of the Federal Bureau of Investigation, on the night of the arrest of the petitioner, Julius Rosenberg—was virtually a pre-trial hearing—without benefit of defense—of the prosecution's case, and a characteristic example of the prejudicial pre-trial revelations made by the prosecutive officials to the press. The statement, detailing almost the full scope of evidence to be presented at the trial, asserted (R. 161-63):

> "J. Edgar Hoover, Director of the Federal Bureau of Investigation, in discussing the background of the case, said that Rosenberg is another important link in the Soviet espionage apparatus which includes Dr. Klaus Fuchs, Harry Gold, David Greenglass and Alfred Dean Slack."
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> * * * * * * *
>
> ". . . Investigation to date reveals that Rosenberg, an American-born engineer, made himself avail-

able to Soviet espionage agents so he 'could do the work he felt he was slated for' and so he might 'do something to directly help Russia' ".

* * * * * * *

". . . his employment was suspended on February 9, 1945, when he was removed by the Secretary of the War Department acting on the recommendation of Rosenberg's commanding officer on the basis of information indicating Communist Party membership. Rosenberg made numerous unsuccessful attempts to be reinstated."

The statement unabashedly announced, as well, the official conviction of Rosenberg's guilt, and qualitatively aggravated the heinousness of his alleged crime (R. 162):

"The gravity of Rosenberg's offense, Mr. Hoover stated, is accentuated by the fact that through his implication in the espionage ring as a native born American citizen he aggressively sought ways and means to secretly conspire with the Soviet Government to the detriment of his own country."

These statements occurred in the context of antecedent and contemporaneous months of widespread and intensive publicity accorded: (1) communism in general; (2) communists as spies; (3) Fuchs' espionage activities, Gold's espionage activities, Greenglass' espionage activities; Brothman and Moskowitz's espionage activities—all resulting either in confessions or convictions, supported by the testimony of witnesses announced to be those who would testify against the petitioners (R. 34-61).

During this period, unlike any preceding or following, there occurred a constant barrage of stories—stemming from Fuchs' and his cohorts' "betrayal"—as to the immediacy, possibility and probability of atomic attack on the United States, in general, and the City of New York in particular (R. 34-61).

Each of these subject matters, almost by common consent, is acknowledged to be a matter of high volatility and passion-arousing qualities. The almost 600 newspaper features, annexed to the petitioners' application, indicate the degree to which the community was saturated with accounts and editorializations of these matters (Exhibits II-XV).

There was no let-up in the publicity which kept the petitioners' alleged misdeeds in the public mind from the time of their arrest to the time of their trial, even though for short periods their specific names may not have received explicit mention. Even in a metropolis as "sophisticated" as New York City, the crime with which the appellants were charged was a *sui generis* "sensation". Even to the "sophisticated" New Yorker, the threat of mass annihilation, predicted as a result of the petitioners' alleged acts, could not be equated with the run-of-the-mill urban "sensations" daily ingested at the breakfast table. The matters concerned were of vital interest to every citizen in terms of his own personal survival, the unprecedented danger of which was represented to him every day, not only by reading the newspapers, but by the urgent effort to whip into shape a functioning civilian defense apparatus immediately capable of coping with the "imminent" danger of attack upon this city and country (R. 56-57).

The Government's announcements concerning the petitioners, in which inhered each subject of the massive publicity set forth in the petition, had the inescapable effect of focussing the public hostility, aroused by each separate subject, upon the petitioners as the embodiment of all, resulting in a public pre-conception of guilt and hostility against them. This evaluation of a public attitude, under the circumstances of this case, is scientifically demonstrable,

as shown by the materials in the Appendix to this petition, submitted herein.[9]

The only conclusion of the Court below, with respect to this showing, was that "the Delaney [*Delaney v. United States*, 199 F. 2d 107 (C. A. 1st, 1952)] publicity [was] more obviously damaging and much closer to the date of trial . . ." (R. 333).

IV

The Atom-Bomb "Secret"

The record shows facts to establish that the Government, or its agents, arbitrarily and capriciouly classified the material allegedly transmitted by the petitioners to the Soviet Union as "secret"; and that in fact it was not "secret" but widely known and published throughout the world—and especially in the Soviet Union, the alleged beneficiary of the transmittal (R. 87-112; 123-27).

The Court below relied on the District Court's "assumption" that what the petitioners' application said was so, but, nevertheless, reached the factual conclusion that it could not be said that "in the United States this information has been made public nor . . . that 'it has become available in one way or another to any foreign government.'" The Court below "had nothing to add" (R. 336).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254. The decision of the Court of Appeals for the Second Circuit was entered December 31, 1952.

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[9] The petitioners made an offer of proof of the testimony of an expert on social psychology to aduce proof, taking into account scientific criteria for evaluating mass reaction, to sustain its contention as to the effect of the publicity barrage in this case. This offer was rejected (R. 242).

Statute Involved

The application of the petitioners is founded on 28 U. S. C. 2255, which provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, § 114, 63 Stat. 105."

Questions Presented

1. Whether, in a capital case, circumstantial proof tending to show the knowing use of perjury by the prosecutor to bring about the conviction, is sufficient to warrant a hearing, under 28 U. S. C., Sec. 2255, to determine the issue.

2. Whether, where there is evidence tending to show that there was fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether there was such an abuse of process.

3. Whether, where there is evidence tending to show that there was a fraudulent abuse of process by the "timing" of an indictment by the prosecutor of one not then on trial, with the intent to prejudice the rights of an accused and having the effect of producing prejudicial publicity during the trial, a hearing should be granted under 28 U. S. C., Sec. 2255, to determine whether the accused was deprived of a fair trial.

4. Whether, when there is evidence tending to show pretrial publicity of a character to bring about communal prejudgment or guilt and hostility against an accused, originating from statements made by the prosecuting authorities, a hearing, under 28 U. S. C., Sec. 2255, should be granted to determine whether the accused was deprived of a fair trial.

5. Whether, in a prosecution under the Espionage Act, in which the secrecy of the information, the subject of the crime, is an essential element thereof, where there is evidence tending to show that the information was widely known and published, a hearing should be granted, under 28 U. S. C., Sec. 2255, to determine whether the information had been arbitrarily classified by the Government as "secret".

Reasons Why the Writ Should Be Granted

The basic reason why certiorari should be granted is found in the Court of Appeal's sanction of a departure from the accepted and usual course of judicial proceedings, in upholding the District Court in its refusal to direct a hearing on claims which raise serious questions as to decency and fairness in the administration of justice. (1) The decision of the Court below raises the question as to whether a claim of the use by a prosecutor of knowingly perjured evidence to procure a verdict, which is promised on circumstantial evidence alone, may be decided, under 28 U. S. C. Sec. 2255, on the face of the pleadings. The determination reached by the Court below is in probable conflict with the decisions of this Court in *Price* v. *Johnson,* 334 U. S. 266 (1948) and *Walker* v. *Johnson,* 312 U. S. 275 (1941). (2) The decision of the Court below raises the question of whether the decisions of this Court in *McNabb* v. *United States,* 318 U. S. 332 (1943) and *United States* v. *Mitchell,* 322 U. S. 65 (1944) are broad enough to control the misconduct of quasi-judicial officials, in the interests of the proper administration of justice, where such misconduct amounts to an abuse of the courts and the machinery of law enforcement. (3) The question is raised in this Court for the first time, as to whether this same power may serve to eradicate the expanding evil practice of prosecutors to exploit the power of the

mass media of communication to influence the outcome of judicial proceedings in criminal cases. The decision of the Court below is in probable conflict with that of the First Circuit in *Delaney* v. *United States,* 199 F. 2d 107 (C. A. 1st, 1952); and (4) The decision of the Court below, in refusing the petitioners a right to be heard on their claim that the information, allegedly the core of the charge against them under the Espionage Act, was not "secret", but widely and publicly known, and arbitrarily classified by Government authorities as "secret", is in probable conflict with the decision of the Court in *Gorin* v. *United States,* 312 U. S. 19 (1941).

I

Perjured Testimony

The first concern of the just and compassionate mind in a capital case is the concern that no two people shall go to their death where there have been facts shown to indicate that the conviction for which they may die was procured by the knowing and deliberate use of false testimony by their prosecutor, without, at least, affording to them the opportunity to establish their claim. It becomes the urgent concern of this Court when it is recognized that the proposition, on which the decision denying them this opportunity rests, will make a shambles of the landmark decision in *Mooney* v. *Holohan, supra,* and render the "great writ" of *habeas corpus*—and the analogous Section 2255—impotent to perform its function "to make certain that a man is not unjustly imprisoned." *Price* v. *Johnson,* 334 U. S. 266, 291 (1948)

Section 2255 of Title 28, U. S. C. announces, by its terms, the right of a petitioner to a hearing to determine his right to vacation of his sentence and release "unless the motions and files and records of the case conclusively show that the prisoner is entitled to no relief." The lower Court's deci-

sion, in effect, holds, to the contrary, that unless the moving papers (files and records) conclusively show that the prisoner is entitled to relief, no hearing will be made available. This is the inevitable force of its determination that a court may, without a hearing, resolve the conflict of inferences, arising from facts shown in the record, which tend to establsh the right to relief (Compare R. 331 with R. 335-6).

Where the claim to be relieved of a conviction and sentences is founded upon the connivance of the prosecution to obtain the conviction by the use of perjured testimony, it is a rare case that a petitioner, without court process, may unlock from the bosom of the conniving prosecutor, or his perjured witness, direct evidence of their conspiracy. The real vigor of the writ of *habeas corpus*, in these circumstances, on a showing of facts from which it may be inferred that such a conspiracy was effected, lies primarily in the right to a hearing, where the power of the court may produce from unwilling witnesses and from the lips, the files and records of the conspirators, the direct proof which, most often, they alone control. See, e. g., *United States ex rel. Montgomery* v. *Ragen*, 86 F. S. 382 (N. D. Ill. E. D. 1949).[9a]

The decision of the Court of Appeals deprives the writ of *habeas corpus* of this force and confines the expectation of successful challenge of a contrived conviction to the rare case by assuring the right to a hearing only in those cases where *direct* proof is made. For the rest, a petitioner must

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[9a] This has not meant that a hearing must be granted where the claim is "palpably unmeritoriousness": *i.e.*, a bald assertion, unsupported by a showing of facts from which the knowing use of perjury may be inferred. *United States ex rel. McCann* v. *Adams*, 320 U.S. 220, 221 (1943); *See: Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C.C.A. 10th, 1941); *Ex parte Deatherage*, 98 F. 2d 793 (C.C.A. 9th, 1938); *Tinkoff* v. *United States*, 129 F. 2d 21 (C.C.A. 7th, 1942); *Sanders* v. *United States*, 183 F. 2d 748 (C.A. 4th, 1950) cert. den. 340 U.S. 921.

run the gamut of a court's speculations in regard to the meaning and portent of the *circumstantial* facts alleged, and suffer its conclusion, *deduced* from those facts, as a substitute for the conclusive proof adducible at a hearing. The logic of *Walker* v. *Johnson*, 312 U. S. 275, 286-7 (1941), directs that such contradictory inferences should "only serve to make the issues which must be resolved by evidence taken . . . [on a hearing] . . . not by the pleadings and affidavits".

The unjust and absurd result of the adoption of the contrary practice is made apparent by this case.

Where the witness Schneider testified he had not seen the petitioners between May or June, 1950 and "today" (the day he testified), although, in fact, he had been secretly introduced into the courtroom by the prosecutor "yesterday", the Court concluded that Schneider's testimony "was not intentionally false," on the basis of its speculation that "before today" was generally understood by the parties to mean "before three weeks ago" (i. e. "before the trial"). This witness, the record shows, was not certain of his identification of the petitioners as the takers of passport photos in his shop. The prosecutor, the record shows, knowing this, secured the witness a pre-view of the petitioners, in deliberate violation of the trial court's ruling excluding witnesses. Surely, Schneider's testimony, available only at a hearing, is most apt to ascertain: (1) whether he misunderstood the denotation of "today", or (2) whether he deliberately failed to mention the prior identification to secure his testimonial probity and/or to conceal his violation of the court's order. Surely, the testimony of the prosecutor, and his aides is most appropriate to determine: (1) whether the prosecutor—in permitting the witness to testify and in explicitly affirming the veracity of it (C. R. 1429 and C. R. 1437)—misunderstood the use of the words "before today", or (2) procured or permitted this wit-

ness to testify falsely to conceal his deliberate violation of the trial court's order.

Where the witness Greenglass testified at the trial that from the *immediate* time of his apprehension he did not "conscientiously withhold" any information concerning his criminal involvements, and that he did not tell his lawyer to "fight" the case, and where (1) the attorney for the witness stated, after the trial, that the witness had "cooperated" "*almost* from the outset", and (2) the prosecutor himself revealed, after the trial, that, at first, the witness had "protested his innocence", and that only later, after the intervention of his wife, did he make a "recantation of those protestations", and, (3) other circumstances existed to show that Greenglass was not immediately "cooperative", the Court decided that the witness had not lied, on the basis of its speculation that (1) "*almost* from the outset" meant "almost *from the outset*"; and that (2) "recantation" did not mean "recantation", as the word is usually understood. Surely (1) the testimony of the witness himself (now in Government custody); (2) the testimony of the witness' wife, now at liberty at the sufferance of the Government; (3) the testimony of the prosecutor, verifiable by his files and records; and (4) the testimony of the attorney for the witness and his wife, verifiable by his files and records, are the only sound basis on which to evaluate the verity of the conflicting inferences which may be drawn from the facts shown.

Undoubtedly the most aberrant aspect of the decision of the Court below was its treatment, in the same respect, of the most crucial allegations of the petitioners' application with reference to Greenglass' perjury, relating to the production and pre-trial reproduction of a sketch of a cross-section of the Nagasaki atom-bomb and its accompanying twelve-page report. The egregiousness of the Court's deci-

sion here is further emphasized by its singular misconception of the petitioners' claim of perjury.

The opinion of the Court clearly shows that the Court was unaware:

(a) that the petition alleged any perjury and its knowing use, in relation to the testimony of Greenglass that he had been able, during the trial, wholly from memory and without aid from any other source, to produce Exhibit 8 and the accompanying explanatory testimony. (*On the contrary, the Court assumed* that such allegations of perjury, and the knowing use of perjury, *were confined solely to Government Exhibits 2, 6, and 7, alleged replicas of sketches only of the lens molds used in atomic bombs*);

(b) that the record contained the affidavits of the scientists Kaiser, Crowther and Hadamard attesting that it was inconceivable that Greenglass, with his conceded total lack of scientific education or training, could have performed this feat; *or that Kaiser had further attested that it was likewise inconceivable that Greenglass could even have produced the alleged original* of Exhibit 8 and of the twelve-page explanatory report. (Again, the Court assumed that such affidavits, like the assumed allegations of the petition, were confined solely to Exhibits 2, 6 and 7, sketches of the *lens mold.*)

As a consequence, the Court of Appeals could not have been aware of the fact that the grounds given in their opinion for rejecting the allegations of perjury and knowing use of perjury in connection with Exhibits 2, 6 and 7, the sketches of the *lens molds*, and for rejecting the affidavits of such scientists with reference to *such lens molds*, had in any event no application to the allegations respecting Government Exhibit 8, *the sketch of the cross-section of the Nagasaki atom-bomb* or to Greenglass' explanatory material.

These reasons given by the Court for rejecting the opinions expressed in the affidavits of the scientists were as follows:

> "In support of their renewed assertion of his perjury, defendants, on the Sec. 2255 motion, presented the affidavits of four scientists who express the opinion that Greenglass, with his limited education as shown at the trial, could not have made the sketches from memory. *Since none of them knew Greenglass, none was in a position to give an opinion about the quality of his memory, which no matter what his education, may have been amply sufficient for this purpose* (fol. 488). As additional evidence concerning Greenglass' memory, these opinions, assuming *arguendo* they would be admissible at a trial, are wholly inadequate to justify a new trial. *The affidavits bear solely on the credibility of his testimony and that issue was properly submitted to the trial jury for decision.*" (Italics supplied.)

These grounds, even were they valid, which they are not, as to Exhibits 2, 6 and 7, sketches of the *lens molds*, are, in any event, wholly inapplicable to the opinions expressed in the affidavits with reference to Exhibit 8, *the sketch of a cross-section of the atom-bomb* and to Greenglass' descriptive testimony.

The affidavit of Kaiser (and, at least inferentially of Dr. Hadamard) stated that it was inconceivable that Greenglass could, wholly from memory, have reproduced during the trial, Exhibit 8 and his descriptive testimony relating to that exhibit. *This statement had essentially nothing to do with any question of Greenglass' memory.* The real basis of the opinion that Greenglass could not have reproduced such material was that his conceded lack of scientific education and training, made it inconceivable that he had the intellectual capacity ever to have produced such informa-

tion generally, and, therefore, there was nothing on which his memory could have operated.

While Greenglass testified that he had seen blueprints of the *lens mold,* represented by Exhibits 2, 6 and 7, and had actually participated in the production of such *lens molds, Greenglass did not testify that he had ever seen a blueprint of a cross-section of the atom-bomb.* Instead, his alleged original production, in September, 1945, of a sketch of such cross-section of the bomb and of twelve pages of descriptive material as to its component elements and principles of its operation, was avowedly based on nothing more than the overhearing of unspecified conversations between unidentified persons at Los Alamos.

Kaiser, knowing the scientific knowledge necessary to produce a cross-section of the atom-bomb and twelve pages of descriptive material as to its component elements and principles of operation, was in a position to express an expert opinion as to whether Greenglass, or anybody else, with such conceded lack of scientific knowledge and training, could have produced such cross-section and descriptive material of the atom-bomb, merely from overhearing unspecified conversations at Los Alamos, and without ever having seen even a blueprint of such bomb.

That this scientific opinion was sufficient to raise an inference of perjury on the part of a witness who testified he was able to so perform is grounded in reason and in law.[9b]

> "Should a person affirm that black was white or white was black, or being in the full possession of his faculties, and having unrestricted use of his limbs, should

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[9b] The issue raised, as can thus be seen, is one of capacity (and, therefore, perjury), and not of credibility. This issue, unlike credibility, was not before the jury, but was kept from it by the ruling of the trial court which prevented the Government's expert, Derry, from responding to the sole question in the record directed toward eliciting proof of capacity. The Court of Appeals, therefore, could not properly have said that the issue had been "submitted to the trial jury for decision" (R. 336).

testify that he actually and necessarily occupied a year in walking a mile, his statements would be so in conflict with recognized possibilities as to be entitled to no credit or character as evidence." *Matter of Harriot*, 145 N. Y. 540, 546 (1895).

Accord: People v. *Galbo*, 218 N. Y. 283 (1916); *People* v. *Bentley*, 357 Ill. 82 (1934); *People* v. *LeBlanc*, 221 P. 2d 236 (1950); *Liggins* v. *United States*, 291 F. 888 (App. D. C., 1924).

The Court below, on the face of the record, here again, on the basis of its own understanding, determined that the affidavits submitted were "inadequate" to raise the inference of perjury.

The issue is, therefore, squarely put before this Court, in each instance, whether on the showing made, the petitioners were entitled to be heard in proof of their claim.

It should not be left to the speculative musings of a court to determine whether facts, on their face, mean one thing or another, when objective determination is possible. The general impatience of the courts with the processing of collateral attacks on judgments should not be allowed to develop from an attitude of annoyance to a hardened rule, which will foreclose, not only irritation, but justice as well.

Certainly, where two lives are at stake, basic rights should not be made to depend on intellectual sleight of hand.

II

The Perl Incident

The record before this Court is acknowledged by the Court below to make a showing of misconduct on the part of the prosecutor, which could not be "too severely condemned", so "wholly reprehensible", and productive of prejudice to the petitioners so beyond recall that "a new

trial . . . should have been granted" (R. 334). Yet, the Court of Appeals withheld its command to accomplish that which, in its judgment "should have been" done. The Court, thus, uniquely, consigns two people to their deaths upon its own confirmation of the corruption of the verdict upon which the convictions rest.

The unseemly result of the determination of the Court below provides evidence enough of a departure from the decisions of this Court, which enjoin upon the lower federal courts the duty, especially where life is at stake, to make effective application of the broad right of an accused to a fair verdict. *See*, e. g. *Hysler* v. *Florida*, 315 U. S. 411, 413 (1942); *Mattox* v. *United States*, 146 U. S. 140 (1892). More, the decisions of the lower courts here, taken together, evince a pragmatic concern to uphold the convictions, for each develops its own rationale, one no more justified in law than the other, to arrive at the same indefensible conclusion.

Propounding the law of the case, the Court of Appeals, on the record before it, concluded that a showing had been made, in the exposure of the "timing" of the return of the Perl indictment to break in the course of the petitioners' trial, of a scheme on the part of the prosecutor designed to injure the petitioners and concealed from the trial court by his deliberate misrepresentation.[10] It held, however, that the "essence of the wrong" done the petitioners did not lie in this calculated fraud upon the court, but in the resultant prejudicial publicity. The publicity it deemed to be prejudiced—and characterized as "wholly reprehensible" —was the prosecutor's "statement made to the press to

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[10] The District Court, on the same showing of facts, reached the contrary conclusion. Although the Court of Appeals praised the District Court's opinion as "able, careful and comprehensive" (R. 330), this divergence, and others noted hereinafter, seriously put into question apologies of the District Court for the conduct of the prosecuting authorities challenged by the petitioners' application.

the effect that the government had expected to use Perl's testimony to corroborate the Greenglasses, and the intimation that because he backed out he had been indicted for perjury" (R. 334). The prejudice created by this statement, the Court was willing to assume, could not have been corrected except by a new trial. The omission of the petitioners to move for a new trial, however, the Court concluded, ousted them of their claim to relief now.[11]

The decision absolves, in result, the improbity of an unscrupulous prosecutor, by shifting the responsibility for the fairness of the trial to the victims of his malfeasance.

Since *Berger* v. *United States*, 295 U. S. 78 (1935), it has been assumed that a United States Attorney, as a "representative of a sovereignty whose obligation . . . [is] that justice shall be done", has a duty, in the public interest,

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[11] Since the Court rests its refusal to vitiate the verdict on the failure of the petitioners to move for a new trial, it is reasonable to assume that it did not mean to infer that the absence of "evidence that any juror read the newspaper story" would preclude relief, as a matter of law. In this connection, however, it is significant to note that the three admonitions of the trial judge, given prior to the Perl incident, directed only to matter respecting "this particular case" (C.R. 153, 194, 403), did not prohibit the jury from reading press coverage such as that concerning Perl. Only after the Perl stories had broken, did the trial court, as if quietly to close the barn door after the horse had gone, add the single phrase: "or anything related to it" (C.R. 847). No instructions other than these four were given during the entire trial. (C.R. 258, 320, 486, 522, 636, 698, 756, 816, 871, 949, 1024, 1072, 1132, 1187, 1248, 1309, 1364, 1441). Furthermore, the newspaper reports which accompanied the publication of the indictment by virtue of the mere linkage of Perl's name with Rosenberg and others, of importance, mentioned at the trial, were fully as damaging to the petitioners, as the single statement referred to by the Court. These reports appeared prominently in every New York City newspaper. Under these circumstances, the courts agree, that it will be presumed that the matter came to the jurors' attention. See *Holt* v. *United States*, 218 U.S. 245 (1910); *Griffen* v. *United States*, 295 F. 437 (C.C.A. 3rd, 1924); *Harrison* v. *United States*, 200 F. 662 (C.C.A. 6th, 1912); *Ogden* v. *United States*, 112 F. 523 (C.C.A. 3rd, 1902); *United States* v. *Ogden*, 105 F. 371 (D.C.E.D. Pa. 1900); *Morse* v. *Montana Ore-Purchasing Co.*, 105 F. 337 (C.C.D. Mont., 1900); *Meyer* v. *Cadwalder*, 49 F. 32 (C.C.E.D. Pa. 1891).

"to refrain from improper methods calculated to produce a wrongful conviction", which subsumes the protection of the rights of an individual accused to the due performance of that duty. *New York Central R. R. Co.* v. *Johnson,* 279 U. S. 310 (1929); *Pierce* v. *United States,* 86 F. 2d 949 (C. C. A. 6th, 1936). Where violation of this duty is "designed and an improper purpose its only explanation" it becomes the "essence of a wrong" in which are involved, not only the rights of an accused, but "the public interest in the maintenance of the nation's courts as fair and impartial forums, where neither bias nor prejudice rules . . ." *Pierce* v. *United States, supra,* at 953. The correction of this wrong is an obligation which the courts have held they themselves owe to that "paramount consideration", and from which an accused must necessarily benefit, although he may neither waive nor frustrate its accomplishment. *Viereck* v. *United States,* 318 U. S. 236 (1943); *New York Central R. R. Co.* v. *Johnson, supra; Estep* v. *United States,* 140 F. 2d 40 (C. C. A. 10th, 1943); *Pierce* v. *United States, supra; cf. Glasser* v. *United States,* 315 U. S. 60, 71 (1942).

The threat which cold, calculated violation of duty bears to the lawful administration of the law, has moved this Court, in other circumstances, as a policy measure, to overturn verdicts which are the "fruits of wrongdoing". Cf. *McNabb* v. *United States,* 318 U. S. 332 (1943); *United States* v. *Mitchell,* 322 U. S. 65, 70 (1944); *Meyer* v. *Cadwalader,* 49 F. 32, (C. C. E. D. Pa. 1891); *Vaughan* v. *Magee,* 218 F. 630 (C. C. A. 3rd, 1914).

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are sum-

marized as 'due process of law' . . ." *McNabb* v. *United States, supra,* at 340.

The character of the misconduct here—deliberate in its inception and deceitful in its concealment from the court—evidences such a wanton unconcern for duty, disrespect for the trial court, and depraved disregard for the rights of the petitioners, on trial for their lives, as to have called for a display of the maximum disciplinary power of the Court. As Judge Frank has remarked, in another connection: "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (C. C. A. 2d, 1946). In fact, the prosecutor here is a case in point of the inefficacy of a prior admonition [*see: United States* v. *Remington*, 191 F. 2d 246, 252 (C. A. 2d, 1951)] to act as a deterrent to future "reprehensible" conduct. The obligation of an accused to try his case with one eye on the newspapers, which the decision of the Court of Appeals imposes if the "prejudicial publicity is deemed the sole essence of the wrong", has not before been demanded. See, e. g. *United States* v. *Marrin*, 159 F. 767, 771 (D. C. E. D. Pa., 1908). It makes worthwhile a risk on the part of a prosecutor that his misconduct will go undetected by parties properly concentrating on the conduct of their cases in the court. *Ibid.* It becomes unprofitable only if the corruption is chargeable to its source, and results, *per se,* in the vacation of the ill-begotten conviction.

The indictment and the arrest of Perl had the effect the event was calculated to achieve. The front page of every newspaper screamed to the public that the Government had caught a "perjurer" who was associated with the "spy" Rosenberg. It was generally reported that his perjury was connected with the investigation of a "Soviet

atomic spy ring", some of whose members were then on trial (R. 73-75). The charge against him, that he denied knowing the "members" then on trial and those alleged to be in illegal confederacy with them, was also stated in the press. No sophisticated reasoning was required to infer from the reported facts that had Perl told the truth he would have inculpated the petitioners. This implicit understanding was made explicit by the statement of the prosecutor, which the Court of Appeals denounced, and declared to be so prejudicial to the petitioners that it, alone, would have warranted a mistrial (R. 333-4). *A fortiori*, the clear implication inherent in the entire press coverage, although overlooked by the Court, must necessarily be considered to have had the same effect. It would, obviously, not have occurred had the prosecutor not contrived to secure the return and publication of the indictment. It is, therefore, as effectively a consequence of his misconduct as the statement issued from his lips.

The disposition which the Court of Appeals made of this, in their view, the "essence of the wrong" done the petitioners, does violence to reality and constitutes an abrogation of its duty to protect the fundamental rights of an accused.

The Court assumed that the omission of the petitioners to move in respect to the single "wholly reprehensible" statement of the prosecutor, represented their "deliberate choice" to go on with the trial in the face of, what the Court considered to be, circumstances fatally prejudicial to them.

It inferred from this assumed "choice" that the petitioners "obviously concluded that the prosecutor's statement to the press had not prejudiced the jury against them" (R. 334). The Court on this basis decided: "Having themselves so concluded, they may not, after an adverse verdict, ask the court to reach a contrary conclusion." This deter-

mination turns well-rooted concepts of due process on their heads.

The due process clause invalidates a conviction which, in fact, has been corrupted by passion and prejudice. The record here makes an inescapable factual showing of extensive prejudicial newspaper publicity accompanying the "timed" Perl indictment. The Court apparently accepted this to be the objective fact when it ruled: "if the defendants had moved for a new trial, it should have been granted" (R. 334). The contrary *opinion* of the petitioners—assuming *arguendo* this to be their opinion—"can hardly legalize a procedure which conflicts with accepted principles of due process." *Lee* v. *Mississippi*, 332 U. S. 742, 744-46 (1948). Nor can it, according to this Court, preclude the accused from raising the due process issue. *Ibid.*

The fundamental vice of the entire structure of legal half-truths upon which the Court supports the foreclosure of the petitioners' right to be relieved of this tainted verdict, is that it is based on a factual void. The record cannot sustain a conclusion that the petitioners' omission to move for a mistrial was the result of a "deliberate choice."

The Court arrives at this conclusion by deduction from two facts alone: (1) the omission to move, (2) "after conferring with the judge" (R. 334). To justify the assumption of "deliberate choice", the facts, upon which the Court relied, had to establish conclusively that the petitioners voluntarily relinquished a right, they knew themselves to have, to the declaration of a mistrial. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 (1942); *Patton* v. *United States*, 281 U. S. 276 (1930); *Glasser* v. *United States*, *supra* at 72. The state of facts upon which the Court relied may not, as a matter of law, be conclusive. *Glasser* v. *United States*, *supra* at 70. The actual facts, as shown by the record, contradict the conclusory assumption of deliberate choice, which, in any event, could not properly be

reached except after the taking of oral testimony. *Price* v. *Johnson,* 334 U. S. 266 (1948); *Walker* v. *Johnson,* 312 U. S. 275 (1941).

The record shows that the petitioners' counsel entered into the off-the-record bench conference out of apprehension of prejudice, but with no knowledge of it. He was aware only that a headline in the New York Times reported that William Perl had been indicted on a charge which linked Perl's name with the Rosenbergs (R. 155, 207; C. R. 756-7, 816). Neither petitioners' counsel, nor counsel for the co-defendant, Morton Sobell, with whom he conferred, had read the newspaper reports of Perl's indictment and apprehension, including the reported statement of the prosecutor (R. 333-4), which, according to the Court, created the prejudice against the petitioners (R. 155, 207). Nor was it proper "to charge him or his client with the knowledge of such publications during the trial." *United States* v. *Marin, supra.* At the conference, the record shows the prosecutor made representations, whose falsity could not have been determined until over a year later, as to the regularity of the return of the Perl indictment (R. 155, 207-8). Given this regularity, it was valid to proceed upon the assumption that the publication of the indictment and factual press reports of it, though invidious in effect, would not support a motion for a mistrial. *United States* v. *Francis,* 144 F. 520 (E. D. Pa., 1906), *sentence mod.* 152 F. 155, cert. den. 206 U. S. 565.[12]

Petitioner's counsel left the bench conference no more aware of the prejudicial press reports than when he entered it, and with a mind, seduced by the misrepresentation of the

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[12] The District Court in this case ruled: "A defendant may not demand that the machinery of law enforcement be stopped while his trial proceeds, or that the prosecution of others, who as he, are charged with violating the law, be held in abeyance until his trial has been completed." (R. 15)

prosecutor, that a motion for a mistrial could not prevail. The circumstances of this case, are unlike that of *Spreckels* v. *Brown*, 212 U. S. 208 (1909) on which the Court below relied. There, defense counsel, with full knowledge of the facts which could injure his cause, and of his right, therefore, to the relief which the trial judge offered it, stated: "Let the jurors read the papers, we will take our chances." *Id.* at 214. Here, it cannot be inferred that counsel's inaction was prompted by a desire to take his chances with this jury; eight motions for a mistrial were made during the course of the trial (C. R. 184, 185, 1037, 1039, 1199, 1200, 1378, 1442).

The conclusive showing, on the entire record, is a negation of "deliberate choice". The demonstration is of the petitioners' intention to exercise all rights accruing to them, coupled with an unawareness of the existence of facts from which the conclusion could be drawn that the right to the declaration of a mistrial, in this instance, had accrued.[13]

To have expected the petitioners, under these circumstances, to have moved for a new trial, would have been to have required of them a sixth sense. Yet, if the fact that "they did not so move", where, had they "moved for a new trial, it should have been granted", should not, in this case, have foreclosed relief.

The decisions of this Court require that "in exceptional circumstances, especially in criminal cases" errors will be corrected where they "seriously affect the fairness, integrity or public reputation of judicial proceedings", even though

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[13] Since the petitioners were no more aware of the circumstances surrounding the Perl indictment when their motions for a new trial were made on April 5, 1951, one week after the return of the verdict, than at the time of the return of the Perl indictment, the observation of the Court of Appeals that the "petitioners did not mention the prosecutor's statement in their motions" (R. 335), is inapposite. Nor could the petitioners have raised the question, as the court suggests, in the criminal appeal, since the subject matter necessarily was *dehors* the record.

not objected to or made the subject of motion by trial counsel. *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); *New York Central R. R. Co.* v. *Johnson, supra; Wiborg* v. *United States*, 163 U. S. 632 (1896); *Pierce* v. *United States, supra.*

This mandate the Court of Appeals did not follow.

A verdict contaminated by the fraud, chicanery and deceit of the prosecutor—a "servant of the law"; a conviction upheld which "should have been" overthrown; the taking of two lives under such a judgment—these, surely, "seriously affect the fairness, integrity and public reputation of judicial proceedings."

It remains with this Court to right the egregious wrong.

III

Government Inspired Pre-Trial and Trial Publicity

This case, in the words of Mr. Justice Jackson, "represents one of the best examples of one of the worst menaces to American justice" [concurring with Frankfurter, J., in *Shepherd* v. *Florida*, 341 U. S. 50, 51 (1951)]: the practice of prosecutors—standard operating procedure in important cases—to exploit the power of the press to surround a defendant, before and during trial, with an enveloping hostile atmosphere and to create a public pre-conception of his guilt.

This practice, over the years, has been variously lamented as "unfortunate," a "serious mistake," a "gross impropriety," "ill-judged and improper," "not to be commended," and to be "seriously condemned." See: *Leviton* v. *United States*, 193 F. 2d 848 (C. A. 2d, 1951) cert. den. 343 U. S. 946; *Allen* v. *United States*, 4 F. 2d 688 (C. C. A. 7th, 1924) cert. den. 267 U. S. 597; *Paschen* v. *United States*, 70 F. 2d 491 (C. C. A. 4th, 1934); *Shushan* v. *United States*, 117 F. 2d 110 (C. C. A. 5th, 1941) cert. den. 313 U. S. 574;

Kersten v. *United States*, 161 F. 2d 337 (C. C. A. 10th, 1947) cert. den. 334 U. S. 850.

But, like the weather, this has been a concern that "everybody has talked about but nobody has done anything about." The judicial habit of helpless piety now confronts the courts with a situation "constantly growing worse," "all too prevalent" and "becoming all too typical of a highly publicized trial." *Shepherd* v. *Florida, supra* at 51; *Allen* v. *United States, supra;* Opinion herein of Ryan, J., in the District Court (R. 13). The most hard-pressed defendants are the ones made to suffer convictions which "do not meet any civilized conception of due process of law." *Shepherd* v. *Florida, supra* at 53; and *see*, dissent of Frankfurter, J., in *Stroble* v. *California*, 343 U. S. 181, 198-201 (1952). The District Court, in this case, conceded as much, stating in its opinion:

> "The issuance of 'releases' and 'statements' [which 'may have prompted, encouraged or generated publicity] by the quasi-judicial officials entrusted with the heavy burden and grave responsibility of prosecution giving in advance of trial details of evidence which it is expected will be introduced at trial is all too prevalent a practice, which should not be encouraged . . . It is opposed to all fundamental concepts of due process . . ." (R. 13).

The contemporary understanding of the operation of the communal mind has evoked the recognition that its intellectual seduction produces a result, not different in essentials from "that which was found a denial of due process in *Moore* v. *Dempsey*, 261 U. S. 86." *Shepherd* v. *Florida, supra* at 54; *see: Fouquette* v. *Bernard*, 198 F. 2d 96, 98 (C. A. 9th, 1952).

The courts and the bar—including several members of this Bench—have expressed growing concern that the existing wrong find its remedy. *See:* dissenting opinion of

Frankfurter, J., in *Stroble* v. *California, supra;* memoranda opinions in *Leviton* v. *United States,* 343 U. S. 946 (1952); *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912 (1950); *Weber* v. *United States,* 73 S. Ct. 42 (1952); *Shepherd* v. *Florida, supra.*

The First Circuit in *Delaney* v. *United States,* 199 F. 2d 107 (C. A. 1st, 1952), met the problem and reached its decision on concepts of law which it evolved to accommodate the facts of life. Insofar as the instant case arises from equivalent circumstances, and relief denied, on the basis of archaic formulae unsuited to cope with this essentially modern dilemma, the cases are in conflict. The due and proper resolution of the conflict by this Court is essential both to the administration of federal criminal justice and to eliminate the terrible suspicion that American justice can tolerate the forfeiture of two lives upon convictions "which do not meet any civilized conception of due process of law."

The *Delaney* case accepts the principle that, where prosecuting officials and the Department of Justice "feed" to the press material, tending to indicate the guilt of a defendant, which results in damaging massive pre-trial publicity and a consequent communal prejudgment of guilt, it is "neither right nor in harmony with the spirit of the Sixth Amendment," to let stand the foreordained conviction.

A seeming adherence to this principle inheres in the decision of the Court below, in that it purports to evaluate the adequacy of the petitioners' showing within the frame of reference of the *Delaney* case. The single aspect, however, in which the Court holds, that the petitioners, as a matter of law, are entitled to no relief, reveals the Court's lack of understanding of the fresh concepts of the *Delaney* case, and the conflict of the decisions. The Court below ruled:

> "On the *voir dire* the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to

the defendants, who did not even use all of the peremptory challenges permitted them. Nor do they allege that any trial juror was in fact prejudiced by the publicity now asserted to have made a fair trial impossible" (R. 332).[14]

The decision in the *Delaney* case is premised on the realistic proposition that, not only is overt proof of a subverted jury mind an impossible burden, but it is, as a matter of law, an unnecessary one. That court by Magruder, J., expressed its rationale to be:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. This is particularly true in the determination of issues involving the credibility of witnesses." *Delaney* v. *United States, supra,* at pp. 112-113.

And the opinion logically extends the thesis:

> "Since he was obliged to stand trial in the hostile atmosphere engendered by the extra-courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions—all of them having affirmed, in answer to inquiry by the trial judge, that they were prepared to determine Delaney's guilt or innocence solely on the basis of evidence produced at the trial." *Id.* at 114.

The weight of scientific opinion supports this view. (See Appendix to petition.)

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[14] It might well be noted that many of the prospective and chosen petit jurors acknowledged that they "remembered" having heard or read about the case prior to trial, and the trial court's affirmation: "I think that is a fair assumption." (C.R. 63).

In respect to the petitioners' demonstration of objective facts tending to establish the existence of publicity from which an inference of communal prejudice and hostility could be drawn, the Court below did not deny the sufficiency of the showing. It merely finds—in an understatement not warranted by the record: ". . . the *Delaney* publicity [was] more obviously damaging and much closer to the date of trial . . ." (R. 333).

The Court, however, treats its estimate of the subjective belief of petitioners' counsel as conclusive evidence of the non-existence of prejudice resulting from the publicity. The Court drew the inference as to counsel's belief from the omission of the petitioners to move either for a change of venue or for a new trial. The exploitation of these omissions as "evidence" of the pre-trial climate is an ingenious circumvention of the refusal of the courts to preclude collateral attacks on a conviction, effected by damaging pre-trial publicity, for failure to make either motion or both. *Stroble* v. *United States, supra* (no pre-trial motions made); *Delaney* v. *United States, supra* (failure to move for change of venue); *Morse* v. *Montana Ore-Purchasing Co., supra* (failure to move for a continuance).

The conclusion, moreover, is based on a record which shows counsel affirmatively to have stated (R. 152-53):

> "I most emphatically deny that I made a deliberate choice in tactics by failing to raise the issue of pre-trial publicity as a deprivation of due process of law. I could make no 'deliberate choice' because I was unaware that I had a choice."

This unawareness, counsel further stated, resulted from the unavailability to him, prior to trial, of the "complete picture" of the pre-trial publicity which "required a perusal and analysis of every newspaper and magazine circulated in the metropolitan area." His inability to acquire a

"complete picture" was a function of his personal habit of "sporadic" newspaper reading, its increased "infrequency" in the course of preparation for trial, and the fact that "only . . . within the last few months" did he acquire sufficient funds [15] "to probe the newspaper materials that surrounded this case, which led [him] to the conclusion that it was proper to raise the issue of the pre-trial publicity" (R. 152-53).

This precise state of facts was envisioned by this Court, in *Price* v. *Johnston, supra* at p. 291, as "justifiable" reasons for not making earlier application for relief. The Court there stated:

> ". . . The primary purpose of a *habeas corpus* is to make certain that man is not unjustly imprisoned. And if for some justifiable reason *he was previously unable to assert his rights or was unaware of the significance of relevant facts,* it is neither necessary nor proper to deny him all opportunity of obtaining judicial relief." (Emphasis ours.)

Price v. *Johnson, supra,* and *Walker* v. *Johnson, supra,* make it completely clear that, in any event, the "justifiability" of the reasons may not be determined on the face of the record, but only on testimony adduced at an oral hearing.

In this case, it was particularly inappropriate to reject, especially on the face of the record, the justifiability of the reason asserted. The "complete picture", as counsel stated, was indispensable to any judgment of the probability of an effect on attitudes being created or reinforced by mass media. The weight of social-psychological opinion insists that, until full material has been assembled and its bulk and content read, such a judgment cannot reasonably be made

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[15] Petitioners, at their trial, proceeded *in forma pauperis.*

(See Appendix, Section A).[16] A comprehension of this concept—or even plain "horse sense"—renders ludicrous the Court's decision to select petitioners' counsel—or any one person—as the "guinea pig" of public reaction.

A burden is imposed upon an accused, to secure his presumption of innocence and right to defend from out-of-court influence, to monitor the mass media of communication in the period preceding trial. Where the threat arises solely from publicity deriving from the private initiative and enterprise of newspapers, the courts, presented with a Solomon's choice in the conflict between the parallel rights to freedom of press and a fair trial, may take pause—although, it is suggested, in this matter that this Court "has not spoken its last word." *Delaney* v. *United States, supra* at 113.

The instant case, however, as it concerns publicity caused and stimulated by prosecuting officials, presents that aspect of the modern phenomenon of "trial by newspaper" that is controllable in the proper exercise of this Court's power. Its control, by silencing those who owe a duty of silence, will eliminate perhaps the most damaging influence in "newspaper trial": the affirmations and opinions of officials, to the prestige of whose office the public generally accords a reputation for infallibility. For this Court to refuse to exercise this supervisory power over the administration of federal criminal justice, will permit the continuance of a practice to which Mr. Justice Frankfurter so eloquently objected in his dissenting opinion in *Stroble* v. *California, supra* at 201:

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[16] Such a judgment, in social-psychological opinion, cannot be made with accuracy by laymen, including judges. The petitioners' offer of proof of the evaluative testimony of a mass psychologist was particularly apposite (R. 242). The rejection of this offer deprived the petitioners of the opportunity to present important substantiating material in support of their claim, and constituted an abuse of the Court's discretion.

"To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice."

IV

The Atom-Bomb "Secret"

United States v. *Heine*, 151 F. 2d 813, 815 (C. C. A. 2nd, 1945), cert. den. 328 U. S. 833, construed the Espionage Act to read that, unless information alleged to be the subject of transmittal—or conspiracy to transmit—to a foreign nation is "secret", no crime is committed under that law. "Secret" information, as defined by the *Heine* case and *Gorin* v. *United States*, *supra*, has the meaning accorded to the more common usage: "classified" information.

This gloss was put upon the statute, in the belief that unless it were so limited it would represent a "drastic repression of the free exchange of information," violative of the First and Fifth Amendment to the Constitution. *United States* v. *Heine*, *supra* at p. 815; 59 Harv. Law Rev. 617 (1946). The application of the statute to situations beyond the bounds judicially described as proper would, therefore, be without constitutional sanction, and a person so convicted would suffer a violation of his constitutional rights.

The record shows facts to establish that the material, alleged to be the subject of the transmittal by the conspiracy of which the petitioners were allegedly a part, avowed to have been classified as "secret", was arbitrarily and capriciously so classified. In fact, it was not "secret" material, but scientific and technological matter widely known and published throughout the world.